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Court Review

Volume 52, Issue 2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 52, Issue 2

2016

EDITOR'S NOTE

In this issue, we present three articles squarely focused on what judges do, addressing issues of emotion, wisdom, and ethics.

In our first article, Sharyn Roach Anleu, David Rottman, and Kathy Mack consider the role of emotion in the work judges do. They have embarked on a four-year international study of judging and emotions; this article provides a first look at background research, their project, and the intersection of emotions and judicial misbehavior as shown in several specific examples. For another look at judging and emotion, take a look at Terry Maroney's prior *Court Review* article, *The Emotionally Intelligent Judge: A New (And Realistic) Ideal*, available online at <http://goo.gl/SL96i0>.

Our second article considers what qualities constitute judicial wisdom. Your editors noticed an online paper by Jeremy Blumenthal and Daria Bakina that summarized their empirical look at factors that might contribute to judicial wisdom. Sadly, after we got their agreement to adapt the article for our readers, Professor Blumenthal died. We are pleased that Professor Bakina made the adjustments needed to turn the online paper into this article. Take a look at the characteristics of a wise judge found in the tables at pages 77 and 78. Which do you think are the most important? We'd welcome your comment in a letter to the editor for publication.

Our third article is one that you'll want to keep handy to give to each new judge appointed to your court. Cynthia Gray, one of the leading experts on judicial ethics, provides an overview of what every new judge needs to consider as he or she moves to the bench. Of course, many of the topics covered are significant to all judges—such as what community activities you can participate in and what business and financial activities you can carry out—so the article will provide a useful review for experienced judges too. We do hope, though, that you'll pass it along to new judges while also telling them about the benefits of membership in the American Judges Association, including *Court Review*.

Keep in mind that past issues of *Court Review* from 1998 to the present are available at amjudges.org/publications. So if you want to find a PDF version of any article to send to a colleague, you can. You'll also find each AJA white paper at amjudges.org/publications.—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 7 of volume 52, issue 1. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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President's Column

THANK YOU, SANTA FE! ON TO TORONTO!

John Conery

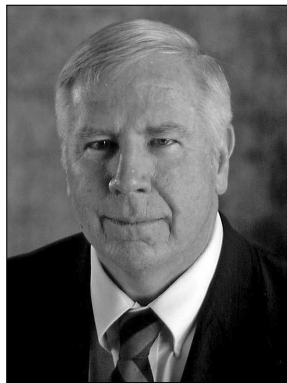
Our 2016 midyear in Santa Fe exceeded all expectations! The Chamber of Commerce “arranged” perfect weather conditions, sunny and cool. The hotel went out of its way to accommodate us, offering complimentary breakfast and complimentary evening cocktails with food. The rooms were spacious and the service top-notch, as was the location near historic Santa Fe Plaza.

Our educational programs were a “bang,” as Gene Lucci and Richard Kayne had a tutorial on gun safety followed by hands-on practice at the Santa Fe Sheriff's gun range. Everyone survived without a scratch, thanks in no small part to our safety-conscious instructors from the Sheriff's office.

Senior Federal Judge James Parker was our luncheon speaker, and he regaled us with tales of early New Mexico “justice.” Judge Parker, along with local celebrity guests Nancy Reynolds and General Bob Kemble (retired), then led us on a guided tour of the historic Santa Fe Federal Courthouse. Federal Court of Appeals Judge Paul J. Kelley, Jr., and Judge Parker took us behind the scenes and explained the historical significance of the magnificent murals that adorned the walls and halls.

The next day, Chief Justice Charles Daniels of the New Mexico Supreme Court then took us on a hilarious PowerPoint journey, explaining the history of the state justice system as he led into his keynote talk on “Pretrial Injustice: The Need for Reform.” Justice Daniels proposed reforms of the money bail system, where “individual release or detention of the accused before trial may depend more on a defendant's financial resources than on individual flight risk or danger to the community.” New Mexico State Judicial Administrator Artie Pepin joined Chief Justice Daniels and presented highlights from a white paper published on this topic. He also discussed proposed reforms he included in a proposed white paper that is expected to be released this fall.

Some of our own AJA stalwarts, Judges Catherine Shaffer, Elizabeth Hines, Richard Kayne, and Gene Lucci, rounded out our educational programs with their timely and insightful presentations. Not to be outdone, newcomers Veronica Alicea-Johnson and Gayle Williams-Byers informed us old “dinosaurs” of the “Perils and Profits of Social Media.” The materials from our Santa Fe conference, as well as past conferences, can be accessed on our website.



I think it can be fairly said that the 2016 Santa Fe Midyear was a huge success! Thanks to all who worked so hard to make it possible, and thanks, especially, to Shelley Rockwell and Barry Forrest, who provide us such great staff support. Thanks to all who attended.

Speaking of attendance, Shelley Rockwell recently sent out AJA's registration information for our upcoming Toronto conference, September 25-30, 2016, at the Marriott Eaton Centre.

President-elect Russ Otter, along with education co-chairs Richard Kayne and Catherine Carlson, have put together another top-notch educational program coupled with outstanding social activities for judges and their families. Judge Otter will be the first Canadian judge to become the president of AJA, and we look forward to joining forces with our Canadian counterparts as together we explore a “comparative approach to justice.” The registration brochure and conference registration and information forms are now available at <http://www.amjudges.org/conferences/>.

Please sign up soon, as we'd like to bring a strong contingent of U.S. judges to Toronto to welcome our Canadian colleagues to membership in the AJA! Stronger ties with Canadian judges can only strengthen our organization and our core mission of Making Better Judges®. The “Voice of the Judiciary®” will be that much stronger with a strong Canadian membership!

As we like to say in the deep South, “Y'all come!” We hope to see you in Toronto!

When Can a Canadian Judge Change Her or His Decision?

Wayne K. Gorman

It is clear that a Canadian judge can change a ruling or decision. For instance, it is well settled in Canada that a trial judge can reconsider a verdict of guilty in a criminal trial based upon the introduction of “fresh evidence”¹ before sentence is imposed² and that an appellate court can subsequently decide an issue it had failed to address in its initial judgment³ or amend “an order already passed and perfected.”⁴

In *R. v. J.A.*, after convicting the accused of a sexual offence, the trial judge received a letter from the victim’s grandfather indicating that the victim had told him that there were more sexual incidents involved than he had described in his testimony.⁵ The trial judge refused to reopen the trial and vacate his verdict or to declare a mistrial. On appeal, the Ontario Court of Appeal noted that “a trial judge who has made a finding of guilt on disputed facts has the authority to vacate the adjudication of guilt at any time before the imposition of sentence or other final disposition, but such authority should be exercised only in exceptional circumstances and in the clearest of cases.”⁶ The Court of Appeal concluded that the trial judge’s “reasons on the mistrial motion confirm that he appreciated and correctly applied the principles governing mistrial applications and the *Palmer* criteria for the admission of fresh evidence in the context of the whole of the evidence led at trial.” It concluded, “His discretionary decision to dismiss the mistrial motion is neither clearly wrong nor based on an erro-

neous principle. I therefore would reject this ground of appeal.”⁷

IMPLIED JURISDICTION

It has been held that the doctrine of “implied jurisdiction” or “jurisdiction by necessary implication” allows a Canadian court to “vary one of its own orders in order to correct clerical mistakes or errors arising from an accidental slip or omission or in order to properly reflect the intention of the court.”⁸

This power has been extended in Canada to the point that it exists even after a court’s formal order has been filed and issued. Thus, in *Chandler v. Alberta Association of Architects*, the Supreme Court of Canada stated:

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *Re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,
2. where there was an error in expressing the manifest intention of the court.⁹

Footnotes

1. See *R. v. Kowall*, 108 C.C.C. (3d) 481, 1996 CarswellOnt 3091 (Can. Ont.); *R. v. Hayward*, 86 C.C.C. (3d) 193, 1993 CarswellOnt 1162 (Can. Ont.).
2. See *R. v. Griffith*, 2013 ONCA 510, 2013 CarswellOnt 10984 (Can. Ont.).
3. See *R. v. Dhanaswar*, 2016 ONCA 229, 2016 CarswellOnt 4357 (Can. Ont.).
4. See *Director of Public Prosecutions v. G.K.*, [2014] IECCA 35 (Ir.). In *In re L and B (Children)*, [2013] UKSC 8 [¶ 16], [¶ 19] (appeal taken from Eng.), the Supreme Court of the United Kingdom indicated that it “has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected. . . . Thus there is jurisdiction to change one’s mind up until the order is drawn up and perfected. Under the [Civil Procedure Rules] (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one’s mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it.”
5. 2015 ONCA 754, 2015 CarswellOnt 16819 (Can. Ont.).
6. *Id.* ¶ 24.
7. *Id.* ¶ 32. The reference to the “*Palmer* criteria” is a reference to *R.*

v. Palmer, [1980] 1 S.C.R. 759 (Can.). *Palmer* is the leading authority in Canada on the introduction of “fresh evidence” on appeal. The criteria set out in *Palmer* for the introduction of such evidence has been adopted to determine if fresh evidence should be introduced at trial after a guilty verdict has been entered but before sentence has been imposed. The criteria as set out in *Palmer* are: “(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. . . . (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.” [1980] 1 S.C.R. 759, ¶ 22.

8. See *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331, ¶ 19 (Can.); *R. v. H. (E.)*, [1997] O.J. No. 1110, 1997 CarswellOnt 1262, ¶ 11 (Can. Ont.); *R. v. Robichaud*, 2011 NBCA 112, 2012 CarswellNB 289, ¶ 4 (Can. N.B.).
9. [1989] 2 S.C.R. 848, ¶ 75 (Can.). In a recent decision from the United Kingdom, reference was made to a court becoming *functus* once the order was “sealed”; see *Samara v. MBI & Partners UK Ltd. (t/a MBI International & Partners Co.)*, [2016] EWHC 441 (QB) [¶ 60].

However, it has also been held that the jurisdiction conferred by implication is a limited one that cannot be turned into “judicial authority to requisition a statutory power withheld by the legislature.”¹⁰ As pointed out by the Supreme Court of Canada in *R. v. Adams*, a “court has a limited power to reconsider and vary its judgment disposing of the case as long as the court is not *functus*.”¹¹ In *McKenzie v. McKenzie*, it was held that a court is not *functus* when a variation of an order is required to correct “an error in expressing the manifest intention of the court.”¹²

Finally, it has been suggested that vacating a verdict of guilty by a trial judge “is a power which . . . should only be exercised in exceptional circumstances where its exercise is clearly called for.”¹³

In this edition’s column, I review two recent Canadian Court of Appeal decisions that have considered the issue of when and how a trial judge should reconsider a decision or verdict rendered: *R. v. Arens*¹⁴ and *R. v. O’Shea*.¹⁵

R. v. ARENS

In *Arens*, the accused was convicted of the offences of impaired driving causing death and dangerous driving causing death.

Before trial, a *voir dire* was held to determine if the arrest of the accused contravened the *Canadian Charter of Rights and Freedoms*, *Constitution Act 1982* (the *Charter*) and whether the evidence obtained as a result of the alleged breaches should be admitted or excluded. The evidence in issue consisted of the observations by officers made after the accused was arrested and video recordings of him taken at the police station (the “impugned evidence”).

The Crown conceded that section 8 [unreasonable search and seizure] and section 9 [arbitrary detention] of the *Charter* had been violated. The Alberta Court of Appeal indicated that these “concessions were made on the basis that the arresting officer lacked reasonable and probable grounds to arrest the appellant and to make an evidentiary breath demand.”¹⁶ The sole issue in contention was whether the “impugned evidence” should be excluded.

The trial judge accepted the Crown’s concession and ruled as follows:

The arresting officer, when he told Mr. Arens to get out of the truck, did not have evidence of impairment attributable to alcohol that was required to make the

arrest. Thus, it was both an arbitrary detention and a violation of Mr. Arens’s rights to be secure against unreasonable search or seizure.¹⁷

However, the trial judge concluded that the “impugned evidence” was admissible.

The evidence called on the *voir dire* was admitted in the trial proper. The accused was subsequently convicted of both charges. In convicting the accused, and without advising counsel in advance, the trial judge reversed his earlier *voir dire* ruling, holding that the *Charter* had not been breached:

It turns out that I was wrong on my *Grant* analysis of section 24(2) of the *Charter*, in the alternative I find that because there was a lawful arrest based on the evidence of reasonable and probable grounds led during the *voir dire*, there is no *Charter* breach to analyze.¹⁸

The accused appealed from conviction. The Alberta Court of Appeal described the issue raised by the appeal in the following manner:

The dispositive issue in this appeal is whether there was a miscarriage of justice as a result of a lack of procedural fairness related to *Charter* rulings in a *voir dire* subsequently reversed in the course of the trial judge’s reasons for conviction, and adverse inferences he made about the appellant’s failure to provide a breath sample.¹⁹

A majority of the Alberta Court of Appeal indicated that failing “to provide an opportunity to present full submissions is an error of law reviewable on a standard of correctness. . . . While procedural fairness is usually associated with administrative law, it applies with full force in the criminal law context.”²⁰

The majority noted that the trial judge had “the authority to reverse his *voir dire* ruling as he was not *functus officio*.”²¹ However, the majority also held that the trial judge’s approach “has the potential of bringing the administration of justice into disrepute. The consequences of these four convictions are significant and scrupulous adherence to procedural fairness is essential in such circumstances.”²²

The majority concluded that the trial judge should have given counsel notice of his reversal decision:

The trial judge should have given the appellant reasonable notice of his decision to reverse himself on the

10. See *R. v. Crocker*, [2012] N.J. No. 266, 2012 CarswellNfld 248, ¶ 14 (Can. Nfld.).

11. [1995] 4 S.C.R. 707, ¶ 29 (Can.).

12. 2016 BCCA 97, 2016 CarswellBC 522, ¶ 22 (Can. B.C.).

13. See *R. v. Lessard*, 30 C.C.C. (2d) 70, 1976 CarswellOnt 8, ¶ 12 (Can. Ont.).

14. 2016 ABCA 20, 2016 CarswellAlta 140 (Can. Alta.).

15. 2016 ONCA 53, 2016 CarswellOnt 574 (Can. Ont.).

16. *Arens*, 2016 ABCA 20, ¶ 8.

17. *Id.* ¶ 10.

18. *Id.* ¶ 13. The reference to “*Grant* analysis” is a reference to *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (Can.), the leading decision in Canada on the test to be applied in determining whether

evidence should be excluded if a violation of the *Canadian Charter of Rights and Freedoms* has been established by an accused person. The test involves a three-stage analysis: “(1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society’s interest in the adjudication of the case on its merits.” 2009 SCC 32, ¶ 71.

19. *Arens*, 2016 ABCA 20, ¶ 2.

20. *Id.* ¶¶ 18-19.

21. *Id.* ¶ 26.

22. *Id.* ¶ 27.

Charter breaches. Doing so would have provided the appellant the opportunity to fully re-argue whether the police had reasonable and probable grounds to arrest the appellant. Given the Crown's concessions and the *voir dire* ruling, this opportunity was essential.

As noted above, the trial judge, having reversed himself on the *Charter* issues, said even in the absence of the impugned evidence, there was a sufficient basis for conviction. However, the trial judge made extensive reference to the following impugned evidence in the course of his reasons for conviction. First, he referred to Corporal Scarrott and Constable Tremblay's testimony about their post-arrest observations of the appellant at the scene. Second, as regards events at the RCMP detachment, the trial judge made note of Constable Tremblay's testimony, the breathalyzer technician's testimony, Constable Brown's evidence, the video recording and the evidence of the paramedics. In other words, a significant portion of the evidence the trial judge relied on was from the evidence that followed arrest. Although he said that he would have convicted on the other evidence, it is not obvious why he then referred to, and seems to have relied upon, much of the impugned evidence.²³

In a dissenting opinion, Justice Martin held that the trial judge's "change of mind was of no consequence":

He initially decided that the evidence was admissible on the understanding that there had been breaches of the appellant's [section] 8 and [section] 9 rights. His ultimate finding that there had not been a breach had no impact on that ruling. In either scenario, the evidence was admissible. This was not a situation where the trial judge reversed himself on the admissibility of evidence.²⁴

R. v. O'SHEA

In *O'Shea*, the accused pleaded guilty to the offence of possession of child pornography. At a pretrial conference, the presiding judge indicated "that a proposed 45 day sentence would be 'reasonable'."²⁵ At the sentence hearing, the same judge imposed a period of one year imprisonment. The accused appealed from the sentence imposed, seeking to have the Court of Appeal reduce it to a period of 45 days.

The appeal was dismissed. The Ontario Court of Appeal indicated that it could not "be suggested that the trial judge was

not entitled to impose a sentence of one year imprisonment":

Even accepting that the appellant's counsel's notation written at the first pre-trial (a pre-trial conducted by the same judge who ultimately accepted the guilty plea and imposed the sentence) to the effect that a proposed 45 day sentence would be 'reasonable', it was entirely permissible for the trial judge to change her mind once she had seen the evidence of the volume and nature of the child pornography possessed by the appellant.²⁶

The Court of Appeal felt that this was reflected in the exchange between the trial judge and defence counsel immediately after she imposed sentence:

THE COURT: Any questions [counsel]?

[Counsel]: Uhm, other than the fact, Your Honour that there had been some judicial pre-trials with respect to resolving the matters, I take it Your Honour was aware of that? Is that correct?

THE COURT: I may have been aware of that, but I haven't viewed the videos and I haven't seen the pictures when the position was given. There's a big difference between [Mr. B.'s] case where it's young adults, no, I'm sorry, older teens, and what was seen on those particular pictures, images and videos.²⁷

CONCLUSION

It is clear that Canadian trial judges can reverse themselves. However, it is also clear that the "rules of natural justice require courts to provide an opportunity to be heard to those who will be affected by a decision" and that a failure "to provide an opportunity to be heard is fatal to a decision."²⁸

In the context of reversing ourselves, great caution is required. Finality plays an important role in the criminal and civil trial process.²⁹ As pointed out by the Ontario Court of Appeal in *Chitsabesan v. Yuhendran*, although "a judge is not *functus officio* where the order has not been signed and entered and therefore retains jurisdiction over a matter, the instances in which it might be in the interests of justice to withdraw reasons of the court and rehear the case on the merits will be 'rare.'"³⁰

We should try to avoid appearing to be making tentative decisions that we subsequently change. A lax approach to finality in decision making has the potential to bring the administration of justice into disrepute. The conflict is always between finality and justice.³¹

23. *Id.* ¶¶ 28-29.

24. *Id.* ¶ 52.

25. 2016 ONCA 53, 2016 CarswellOnt 574, ¶ 5 (Can. Ont.).

26. *Id.*

27. *Id.*

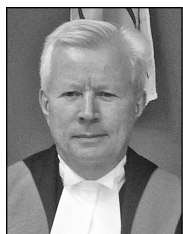
28. See *Lymer v. Jonsson*, 2016 ABCA 32, 2016 CarswellAlta 134, ¶ 3 (Can. Alta.).

29. In *Hafichuk-Walkin v. BCE Inc.*, 2016 MBCA 32, 2016 CarswellMan 75, ¶ 39 (Can. Man.), it was noted that the "integrity of the administration of justice requires finality in litigation. The evils that multiplicity of proceedings give rise to are duplicative litigation,

potential inconsistent results, undue costs and inconsistent proceedings."

30. 2016 ONCA 105, 2016 CarswellOnt 1615, ¶ 11 (Can. Ont.).

31. In *In re L and B (Children)*, [2013] UKSC 8 [¶ 46], it was suggested that as "Peter Gibson LJ pointed out in *Robinson v Fernsby* [2004] WTLR 257, para 120, judicial tergiversation is not to be encouraged. On the other hand, it takes courage and intellectual honesty to admit one's mistakes. The best safeguard against having to do so is a fully and properly reasoned judgment in the first place."



Judges' Journal.

Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. Judge Gorman's work has been widely pub-

lished. His latest articles are The Impact of the Supreme Court on Sentencing in Canada, 72 Supreme Court Law Review (Second Series) 319 (2016), and Ours Is to Reason Why: The Law of Rendering Judgment, 62 Criminal Law Quarterly 301 (2015). Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca. For United States judges who may want to read in full one of the Canadian decisions referred to here, you can contact Judge Gorman and he will forward a copy to you by email.

LETTERS

Editors, COURT REVIEW:

The article by Wechsler et al., "The Impact of Forensic vs. Social-Science Evidence on Judicial Decisions to Grant a Writ of Habeas Corpus" (COURT REVIEW, Vol. 51, #4) contains a serious, fundamental problem. Starting with the title, the authors talk throughout of "social science evidence." That would lead a reader quite reasonably to expect a presentation of a contest between, on the one hand, testimony about research on mistaken identity (e.g., by Elizabeth Loftus), and, on the other, perhaps DNA evidence as "forensic" evidence. *But NO social science evidence is ever used in the vignettes presented to the judges.* Although, separately, judges are asked in a survey about such evidence, their survey responses are not linked to their vignette-based decisions about evidence. The authors' error begins with a failure to define "social science evidence" and in their saying (at p. 161) that evidence of false confessions and eyewitness misidentification "fall[s] under the defined domain of social-science evidence in line with social-psychological research" Yes, social psychologists have been the

primary investigators on issues as to false confession and eyewitness misidentification, but that doesn't make *those topics themselves* (eyewitness misidentification and false confessions, as evidentiary matters) "social science evidence," which instead would be the introduction of *social science studies* through citation in briefs, mention in lawyers' argument, and in expert witness testimony. To repeat, none of that social science evidence is presented in the study vignettes. The result is that the article is a study only of judges' reactions to *various kinds of problematic evidence*, which it is certainly worthwhile to study. However, because no social science evidence is present in their vignettes, the authors did *not* test judges' reactions to social science evidence.

Thus the authors' conclusions about judges' reactions to social science evidence cannot stand.

Stephen L. Wasby

Professor of political science emeritus, University at Albany Eastham, Mass.

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Answers to Crossword from page 91



The Emotional Dimension of Judging:

Issues, Evidence, and Insights

Sharyn Roach Anleu, David Rottman & Kathy Mack

Judicial emotions—their display in the courtroom, influence on judicial behavior, and ultimately, their impact on public trust in the judiciary—are under scrutiny as neuroscientists and social scientists take a fresh look at judicial work and conduct. Emotions and their regulation raise important issues for the exercise of judicial authority, a role in which emotion is formally excised.¹ What has been called “emotional labor” is one of several key concepts guiding empirical research and offering insights into how judges undertake their work.² Other related or overlapping concepts include implicit bias, mindfulness, and procedural fairness. Judges have been introduced to these concepts and associated research through several articles published in the journal *Court Review* over recent years.³ One of these articles, an American Judges Association white paper titled “Minding the Court: Enhancing the Decision-Making Process,” highlights the degree to which these scientific insights are interrelated in their implications for judicial work.⁴ For example, consideration of these concepts and research initiatives has implications for judicial performance and the conduct of evaluations.⁵

This article seeks to enhance understanding of the role of emotions in judging and how emotions interrelate with other factors that influence judicial conduct, especially in court. It does so by introducing a four-year program of research, “Changing Judicial Performance: Emotions and Legitimacy”

(hereinafter “Emotions and Judging”), that is empirical in focus and comparative in perspective. The empirical component involves multiple sources of data in the United States and Australia that bear on the role of emotion in judicial behavior. The comparative component takes advantage of extensive qualitative and quantitative research available on the Australian judiciary that speaks directly to the use of emotions in judging.⁶ Comparative research helps to refine the approach to a topic of inquiry by raising new conceptual and research questions and, on that basis, sharpening understanding of that topic.

This article is organized into five sections, beginning with an explanation of why judges should be interested in research on the role of emotions in their work. Section II offers a brief summary of the social science study of emotions generally and the manner in which it is being applied to judges. Section III provides an overview of a new four-year international study of judging and emotions. Section IV introduces the data sources available for a comparative study and uses that information to take an initial look at promising themes for the research. The concluding section offers preliminary observations on ways emotions in judging might be studied and the value of such research.

Before proceeding, however, it is helpful to be clear on what is meant by “emotion,” a term capable of covering a wide variety of states of mind and physical embodiment.⁷ At a general

Acknowledgment

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Footnotes

1. Terry Maroney & James Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142 (2014); Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629 (2011).
2. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983); Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011); Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work*

and Emotional Labour, 32 J. L. & SOC'Y 590 (2005); JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999); Jennifer Scarduzio, *Managing Order Through Deviance: The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 MGMT. COMM. Q. 283 (2011).

3. See, e.g., Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007); Pamela Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64 (2012); Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013); Terry Maroney, *The Emotionally Intelligent Judge: A New (and Realistic) Ideal*, 49 CT. REV. 100 (2013).
4. See Casey, Burke & Leben, *supra* note 3.
5. See Jennifer Elek, David Rottman & Brian Cutler, *Judicial Performance Evaluation in the States: A Re-Examination*, 98 JUDICATURE 12 (2014).
6. See, e.g., Sharyn Roach Anleu & Kathy Mack, *Judicial Authority and Emotion Work*, 11 JUD. REV. 365 (2013).
7. Jan E. Stets, *Current Emotion Research in Sociology: Advances in the Discipline*, 4 EMOTION REV. 326 (2012); JAN E. STETS & JONATHAN H. TURNER, *HANDBOOK OF THE SOCIOLOGY OF EMOTIONS: VOLUME II* (2014); Thomas Dixon, “Emotion”: *The History of a Keyword in Crisis*, 4 EMOTION REV. 338 (2012).

level, “emotions can be viewed as culturally delineated types of feelings or affects.”⁸ Emotions can be understood as a product of social interactions; they are embedded in interpersonal relations and particular contexts.⁹ They are experienced, expressed, or displayed and are recognized or interpreted by others. Judicial words and actions in court can entail emotional display and project feelings.¹⁰

One list of what constitutes “emotion” includes both positive and negative states of “happiness, joy, pride, guilt, disappointment, anger, frustration and anxiety.”¹¹ Another list, derived from empirical research (survey data) identifies “nine primary kinds of experienced emotions—tranquility, hope, joy, pride, self-reproach, anger, rage, fear, distress—and varying levels of correlation among these emotions.”¹²

Empathy has been widely discussed in the context of judging and has potential implications for understandings of impartiality,¹³ though there is considerable debate about whether empathy or compassion are emotions or capacities.¹⁴ Following Susan Bandes and Jeremy Blumenthal’s caution against using terms for specific emotions “as if they have stable meanings,”¹⁵ this article does not attempt to distinguish among the various types of emotion judges may experience, display, or deploy.

I. THE PRACTICAL IMPLICATIONS OF EMOTIONS FOR JUDGING

Conventional understandings cast the judicial role as strictly unemotional, with impersonality and dispassion central to neutrality, legal authority, and legitimacy. Emotion is viewed as inherently irrational, disorderly, impulsive, and personal and therefore inconsistent with the legitimate exercise of judicial authority.¹⁶ Performance of judicial authority should evince emotionlessness.¹⁷ These understandings also exclude and ignore the interpersonal dynamics that occur in court-

rooms. In sociological terms, the courtroom is more than a legal setting; it is a social situation in which information and emotions must be managed with similar strategies as in ordinary, everyday face-to-face interactions.¹⁸

The neglect of the emotional and interactive components of being a judge may have several potential consequences for how judges view and perform their work.

First, despite the ideal of a dispassionate judicial officer, the everyday work of judging necessarily implicates emotions. They are engrained in human behavior: “Put succinctly, emotions and decision making go hand in hand.”¹⁹ Being a judge and having the benefit of a legal education may restrain the influence of emotions on courtroom behavior and work performance, but only to a degree. A recent research study concludes, “Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike, but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants.”²⁰ At the very least, judges must undertake emotion work to regulate their emotions to present the image or outward appearance in the courtroom they believe appropriate when presiding over cases.²¹ Their everyday work also requires emotional labor to limit the influence of their feelings on their decisions in individual cases in much the same way that implicit bias must be countered if its influence in judicial decisions is to be reduced.

Second, judges’ failure to regulate their own emotions may lead to a violation of the applicable codes or rules of judicial conduct.

The neglect of the emotional and interactive components of being a judge may have several potential consequences

8. Peggy A. Thoits, *The Sociology of Emotions*, 15 ANN. REV. SOC. 317, 318 (1989).
9. Kathryn J. Lively, *Status and Emotional Expression: The Influence of “Others” in Hierarchical Work Settings*, in SOCIAL STRUCTURE AND EMOTION (Jody Clay-Warner & Dawn T. Robinson eds., 2008); Kathryn J. Lively & Emi A. Weed, *Emotion Management: Sociological Insight into What, How, Why, and to What End?*, 6 EMOTION REV. 202 (2014).
10. Kwai Hang Ng & Jeffrey L. Kidder, *Toward a Theory of Emotive Performance: With Lessons from How Politicians Do Anger*, 28 SOC. THEORY 193 (2010).
11. Kristina Murphy, *Procedural Justice, Emotions and Resistance to Authority*, in EMOTIONS, CRIME AND JUSTICE 211, 211 (Susanne Karstedt, Ian Loader & Heather Strang eds., 2011).
12. Kathryn J. Lively & David R. Heise, *Sociological Realms of Emotional Experience*, 109 AM. J. SOC. 1109, 1127 (2004).
13. See Rebecca K. Lee, *Judging Judges: Empathy and the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145 (2014); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE NOVO 133 (2009); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Robin West, *The Empathetic Turn*, in PASSIONS AND EMOTIONS: NOMOS LIII (James E. Fleming ed., 2012).
14. Bandes, *supra* note 13, at 136.
15. Susan Bandes & Jeremy Blumenthal, *Emotion and the Law*, 8 ANN.

- REV. L. & SOC. SCI. 161, 164 (2012).
16. See Maroney, *supra* note 1.
17. See Keith Bybee, *Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making*, 8 ANN. REV. L. & SOC. SCI. 69 (2012); Leslie Moran, *Judging Pictures: A Case Study of Portraits of the Chief Justices, Supreme Court of New South Wales*, 5 INT’L J. L. CONTEXT 295 (2009); David Thomas, *Sentencing: The Case for Reasoned Decisions*, 10 CRIM. L. REV. 245 (1963).
18. Erving Goffman, *The Interaction Order*, 48 AM. SOC. REV. 1, 8 (1983); see also Sharyn Roach Anleu & Kathy Mack, *Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts*, 51 J. SOC. 1052 (2015); PAUL ROCK, *THE SOCIAL WORLD OF AN ENGLISH CROWN COURT: WITNESSES AND PROFESSIONALS IN THE CROWN COURT CENTRE AT WOOD GREEN* (1993); DOUGLAS W. MAYNARD, *BAD NEWS, GOOD NEWS: CONVERSATIONAL ORDER IN EVERYDAY TALK AND CLINICAL SETTINGS* (2003).
19. Jennifer Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 801 (2015).
20. Andrew Wistrich, Jeffrey Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?* 93 TEX. L. REV. 855, 911 (2015).
21. Maroney & Gross, *supra* note 1; Stina Bergman Blix & Åsa Wettergren, *A Sociological Perspective on Emotions in the Judiciary*, 8 EMOTION REV. 32 (2016); Scarduzio, *supra* note 2.

[T]he role of emotion in judging, especially in the courtroom, is an emerging field of research.

Codes of judicial conduct and criteria for judicial performance evaluation take emotions and their display into consideration. Such codes and criteria are most formally and specifically articulated in the United States. The American Bar Association's Model Code of Judicial Conduct (adopted in many states) provides rules and commentary indi-

cating that failure or inability to control emotions puts judges at risk of disciplinary complaints from litigants, attorneys, and others. Indeed, "[c]harges of impatient, angry and impolite behavior on the bench generate a large proportion of complaints filed with judicial conduct commissions."²² The ABA's Model Program for Evaluating Judicial Performance also contains criteria related to the display of emotions.²³ In Australia, guidelines state that it is "desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. . . . A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial."²⁴

Third, a conscious and appropriate display of emotions can play a positive role in court craft. The increased focus on the positive side of emotion in decision making is general: "[p]sychologists in recent years have devoted considerable attention to the role—both positive and negative—that emotion plays in people's thinking."²⁵ The positive role emotions can play in judging is increasingly recognized as judicial officers are being asked to engage with court users in a more human and emotionally intelligent way and to manage emo-

tions, both theirs and others', especially in the courtroom.²⁶ The explicit recognition of a place for emotions in judicial work is especially evident in concepts such as procedural justice and therapeutic jurisprudence.²⁷

II. HOW EMOTIONS SHAPE JUDICIAL BEHAVIOR ON THE BENCH

The empirical social science study of emotions and work developed in the 1980s with a focus on people in jobs requiring interaction with the public. "Emotional labor" referred initially to the dissonance experienced by people in customer-service jobs. Such workers are expected to manage their emotions in a manner that presents the public with an employer-prescribed presentation of their selves.²⁸ Their outward display is supposed to be unaffected by their privately felt emotions. In the pioneering work of Arlie Hochschild, emotional labor is defined as "the management of feeling to create a publicly observable facial and bodily display."²⁹ Over time, the study of emotional labor extended to professionals like lawyers, medical doctors, and, recently, to judges—sometimes referred to as "privileged emotion managers."³⁰ Compared to service workers, "professionals interact with clients rather than customers and have a much greater degree of autonomy."³¹ For these workers, the nature and complexity of the role of emotions is different.

Although there is considerable research and literature on judges, the nature of judging, judicial decision making,³² and emotions, both experienced and expressed,³³ the role of emotion in judging, especially in the courtroom, is an emerging field of research.³⁴ Scholarly attention to emotions in criminal justice, especially trials and sentencing, tends not to consider emotion in relation to the judicial role across the range of judi-

22. CYNTHIA GRAY, *ETHICAL STANDARDS FOR JUDGES* 4 (2009). The American Bar Association Model Rule of Judicial Conduct 2.8 (Decorum, Demeanor, and Communication with Jurors) states: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity." Comment [1] states that "Judges can be efficient and businesslike while being patient and deliberate." MODEL CODE OF JUD. CONDUCT r. 2.8 (AM. BAR ASS'N 2011).
23. See Elek, Rottman & Cutler, *supra* note 5.
24. See, e.g., THE COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *GUIDE TO JUDICIAL CONDUCT* 17 (2007); see also A. M. Gleeson, *Performing the Role of the Judge*, 10 JUD. OFFICERS BULL. 57 (1998).
25. David Klein, *Introduction to THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, at xi, xv (David Klein & Gregory Mitchell eds., 2010).
26. See Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELBOURNE U. L. REV. 1096 (2008); MICHAEL KING ET AL., *NON-ADVERSARIAL JUSTICE* (2014).
27. Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, L. & SOC. INQUIRY (2015); King, *supra* note 26; KING ET AL., *supra* note 26; John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. LAW BULL. 233 (2002); Murphy, *supra* note 11.
28. Amy Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147, 155 (2009).
29. HOCHSCHILD, *supra* note 2, at 7.

30. Wharton, *supra* note 28, at 152; see also SHARON C. BOLTON, *EMOTION MANAGEMENT IN THE WORKPLACE* (2004); Sharon C. Bolton & Carol Boyd, *Trolley Dolly or Skilled Emotion Manager? Moving on from Hochschild's Managed Heart*, 17 WORK, EMPLOYMENT & SOC'Y 289 (2003); Charlen Westaby, *'Feeling Like a Sponge': The Emotional Labour Produced by Solicitors in Their Interactions with Clients Seeking Asylum*, 17 INT. J. LEGAL PROF. 153 (2010); Joy Kadowaki, *Maintaining Professionalism: Emotional Labor Among Lawyers as Client Advisors*, INT. J. LEGAL PROF. (2015); Åsa Wettergren & Stina Bergman Blix, *Empathy and Objectivity in the Legal Procedure: The Case of Swedish Prosecutors*, J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION (forthcoming).
31. Wharton, *supra* note 28, at 153.
32. See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Bergman Blix & Wettergren, *supra* note 21; LEE EPSTEIN, RICHARD POSNER & WILLIAM LANDES, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); MICHAEL KIRBY, *JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD* (2004); Jeffrey Segal, *Judicial Behavior*, in OXFORD HANDBOOK OF LAW AND POLITICS 19 (Keith Wittington et al. eds., 2010).
33. See HOCHSCHILD, *supra* note 2; Wharton, *supra* note 28.
34. See Bandes & Blumenthal, *supra* note 15; Maroney & Gross, *supra* note 1; Roach Anleu & Mack, *supra* note 6; Mary Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 1 CULTURE & HUMANITIES 75 (2010).

cial assignments and judicial actions.³⁵ Some legal scholars provide important conceptual insights about judicial emotion but often depend on the reflections of a few judicial officers rather than substantial empirical data.³⁶ Similarly, the considerable professional literature about judicial performance evaluation, especially in the United States, mainly describes practical aspects of evaluation and rarely incorporates explicit attention to displays of emotion or to judges' experiences and perceptions.³⁷ One exception, an observational study of courtrooms in two American municipal courts supplemented by interviews with 12 of their judges, concludes, "it is clear that the professional work of judges is actually quite emotional, especially during the legal process."³⁸

This brief summary of existing perspectives and research sets the stage for introducing the Emotions and Judging Project, dedicated to building a more systematic empirical foundation for studying how judges experience, manage, and display emotions, especially in the interactive environment of the courtroom.

III. THE EMOTIONS AND JUDGING PROJECT³⁹

The Emotions and Judging Project is a program of research designed to generate original empirically based knowledge about emotion and judging by investigating how emotion (including emotionlessness) is performed and managed. It aims to explain under which conditions judicial emotion and emotional expression appear and assess when and how such emotions enhance or detract from judicial performance. It will integrate new knowledge about judicial emotion with core concepts of impartiality and legitimacy to build an innovative understanding of judicial behavior, especially in relation to, or when interacting with, others in court.

In social science terms, this comparative project addresses the "fit" between emotion in judges' everyday work and the norms (explicit and implicit) regarding judicial performance and its evaluation. Norms are expectations for behavior that

can be enforced either as a rule by an authority (e.g., judicial canons) or by less formal reputation-based consequences (the latter are sometimes called "social norms").⁴⁰

The Emotions and Judging Project responds to four key changes in judicial work that heighten the role of emotions, positively and negatively. First, the norms of judicial behavior are changing in ways that will expect or even require certain kinds of potentially emotionally laden conduct, or at least the appearance of greater engagement, and to recognize the emotional and social needs of others in the courtroom. One example is the growth of problem-oriented courts, such as drug courts, mental-health courts, and community courts. These courts often draw on therapeutic jurisprudence principles and increasingly rely on practices based on procedural fairness.⁴¹ The link between judging and both therapeutic jurisprudence and procedural fairness is not limited to problem-oriented courts; these ideas, along with procedural-fairness principles and approaches, are beginning to inform everyday judicial work in Australia and in the United States, especially in lower courts.⁴²

Second, another growing challenge to the conventional understanding of judging as detached and emotionless is the increasing proportion of litigants in the United States and in Australia that either need to or want to represent themselves in court. The role of the attorney is either absent or diminished in such cases. Both developments require greater attention to emotions, different emotional capacities such as empathy, and more emotion work, including management of the judicial officer's own emotions or those of others.⁴³ Each requires some judicial

The Emotions and Judging Project responds to four key changes in judicial work that heighten the role of emotions, positively and negatively.

35. See Arie Freiberg, *Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y 265 (2001); Murphy, *supra* note 11; ROCK, *supra* note 18; Susanne Karstedt, *Emotions and Criminal Justice*, 6 THEORETICAL CRIMINOLOGY 299 (2002); JESSICA JACOBSON ET AL., INSIDE CROWN COURT: PERSONAL EXPERIENCES AND QUESTIONS OF LEGITIMACY (2015).
36. See Roach Anleu & Mack, *supra* note 2; Bandes & Blumenthal, *supra* note 15; Maroney, *supra* note 2; Maroney, *supra* note 1; Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 223 (1996); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001); Bergman Blix & Wettergren, *supra* note 21.
37. See David Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008); GARY K. BURGER, ATTORNEYS' RATINGS OF JUDGES: 1998-2006, MOUND CITY, MO: REPORT TO THE MOUND CITY BAR (2007); Jennifer Elek & David Rottman, *Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods*, 49 CT. REV. 140 (2013); Rebecca Gill, Sylvia Lazos & Mallory Waters, *Are Judicial Performance Evaluations Fair to Women and Minorities—A Cautionary Tale from Clark County, Nevada*, 45 L. & SOC'Y REV. 731 (2011).
38. The study also claimed that "it seems municipal court judges use emotion as a tool, either implicitly or explicitly, to draw attention to the power they possess and to cue the defendants into which

- behaviors are appropriate and which are not." Scarduzio, *supra* note 2, at 305.
39. The "Changing Judicial Performance: Emotion and Legitimacy" project is supported by Australian Research Council Discovery Project Grant (DP 150103663), including an International Collaboration Award with the National Center for State Courts.
40. Michael Hechter & Karl-Dieter Opp, *Introduction to SOCIAL NORMS*, at xi, xviii (Michael Hechter & Karl-Dieter Opp eds., 2001); SHARYN ROACH ANLEU, DEVIANCE, CONFORMITY AND CONTROL (2006).
41. David Rottman & Jordan Bowman, *Problem-Solving Courts*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4000 (David Weisburd & Gerben Bruinsma eds., 2013).
42. See Donald Farole, *Problem Solving and the American Bench: A National Survey of Trial Court Judges*, 30 JUS. SYS. J. 51 (2009); DONALD FAROLE ET AL., PROBLEM-SOLVING AND THE AMERICAN BENCH: A NATIONAL SURVEY OF TRIAL COURT JUDGES (2008); ROSEMARY SHEEHAN & ALLAN BOROWSKI, AUSTRALIA'S CHILDREN'S COURTS TODAY AND TOMORROW (2013); MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE (2014); Jamey Hueston & Kevin Burke, *Exporting Drug-Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court*, 52 CT. REV. 44 (2016).
43. See Roach Anleu & Mack, *supra* note 2.

These developments are changing the definition of good judging.

engagement with court participants as people with social relationships and personal needs rather than as simply cases or legal categories.⁴⁴

Third, there is increased attention to the qualities and skills needed for judicial performance as part of initial appointment, ongoing professional development, and evaluation of individual judicial performance. Judicial appointment within Australia is being formalized, with explicit statements of required or expected skills and qualities.⁴⁵ Expanded professional development programs enable judicial officers to improve their performance according to articulated expectations that sometimes expressly address emotions.⁴⁶ Judicial performance evaluation, especially in the United States, identifies actions that conform to or depart from models of good or acceptable judicial behavior.⁴⁷ In the ABA Model Judicial Performance Survey, relevant criteria are found in the area of “Professionalism and Temperament” (as well as under “Integrity and Impartiality”).⁴⁸ In Australia, judicial performance is coming under broader scrutiny from governments and the public.⁴⁹ This desire for scrutiny and accountability has a long history in the United States, where formal judicial performance evaluations take place in nearly

one-half of the states and are encouraged by leading professional organizations such as the American Bar Association.⁵⁰

Fourth, the composition of the judiciary is changing, with more women in all judicial roles. A substantial international literature addresses the question of whether women judges will make a difference to judging or will judge differently.⁵¹ The conventional model of the judge may associate legitimate judicial performance with a particular kind of masculinity and its associated emotions and feeling rules.⁵² Recent scholarship suggests that, regardless of whether women themselves judge differently, it appears that they may be evaluated differently.⁵³

These developments are changing the definition of good judging. They create a practical tension for judicial officers in their everyday work and a conceptual tension for those seeking to understand judging. Judicial behavior that effectively incorporates human personality and feeling may enhance public confidence in the courts and the judiciary.⁵⁴ However, some human, emotionally laden judicial behavior could indicate that the judicial officer is not sufficiently detached and so raise questions about the impartiality and legitimacy of judicial authority.⁵⁵ The Emotions and Judging Project addresses these tensions by examining the ways judicial officers experience and display emotion and assesses the implications for legitimate judicial performance and its evaluation.

44. However, some question the legitimacy of more engaged judging, in light of conventional understandings of judicial impartiality as detachment. See Louraine Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model*, 28 JUST. SYS. J. 317 (2007); Carol Heimer, *Solving the Problem of Trust*, in TRUST IN SOCIETY 40 (Karen S. Cook ed., 2001); Carol A. Heimer, *Cases and Biographies: An Essay on Routinization and the Nature of Comparison*, 27 ANN. REV. SOC. 47 (2001); Kathy Mack & Sharyn Roach Anleu, *Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices*, 37 MONASH U. L. REV. 187 (2011).

45. DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL (QLD), REVIEW OF THE JUDICIAL APPOINTMENTS PROCESS IN QUEENSLAND (2015), available at http://www.justice.qld.gov.au/_data/assets/pdf_file/0016/441700/discussion-paper-judicial-appointment-review.pdf; JUDICIAL CONFERENCE OF AUSTRALIA, JUDICIAL APPOINTMENTS: A COMPARATIVE STUDY (2015); Simon Evans & John Williams, *Appointing Australian Judges: A New Model*, 30 SYDNEY L. REV. 295 (2008); see, e.g., AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION, SUGGESTED CRITERIA FOR JUDICIAL APPOINTMENTS (2015).

46. JUDICIAL COLLEGE OF VICTORIA, 2014 PROSPECTUS 8 (2014), available at <http://www.judicialcollege.vic.edu.au/sites/default/files/130827%20FINAL%20Prospectus%20-%20Web%20Version.pdf>.

47. AMERICAN BAR ASSOCIATION, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005).

48. These categories appear in all of the model surveys except for the juror survey. Relevant questions asked of attorneys include whether the judge: 4.a. “Acts in a dignified manner”; 4.b “Treats people with courtesy”; 4.c “Acts with patience and self-control”; and 4.g “Promotes public understanding of and confidence in the courts.” The surveys are available on the American Bar Association’s website. AMERICAN BAR ASSOCIATION, JUDICIAL PERFORMANCE RESOURCES, http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html.

49. LAW REFORM COMMISSION OF WESTERN AUSTRALIA, COMPLAINTS AGAINST JUDICIARY: FINAL REPORT (2013); Sharyn Roach Anleu,

Kathy Mack & Jordan Tutton, *Judicial Humour in the Australian Courtroom*, 38 MELBOURNE U. L. REV. 621, 629-37 (2014); William Phillips, *Complaints Against Judges and Public Confidence in the Judiciary: Does South Australia Need a Complaints Handling Body?* 33 CIV. JUST. Q. 427 (2014); Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System That Enhances Institutional Integrity*, 38 MELBOURNE U. L. REV. 1 (2014).

50. See Elek, Rottman & Cutler, *supra* note 5.

51. See, e.g., ROSEMARY HUNTER, CLARE MCGLYNN & ERIKA RACKLEY, FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (2010); ULRIKE SCHULTZ & GISELA SHAW, GENDER AND JUDGING (2013).

52. L. J. Moran, *Judging Pictures: A Case Study of Portraits of the Chief Justices, Supreme Court of New South Wales*, 5 INT’L J. L. CONTEXT 61 (2009); Margaret Thornton, “Otherness” on the Bench: How Merit Is Gendered, 29 SYDNEY L. REV. 391 (2007); RAEWYN CONNELL, CONFRONTING EQUALITY: GENDER, KNOWLEDGE AND GLOBAL CHANGE (2011); RAEWYN CONNELL, GENDER (2002); R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 9829 (2005).

53. See Brody, *supra* note 37; Jennifer K. Elek, David B. Rottman & Brian L. Cutler, *Judicial Performance Evaluation Steps to Improve Survey Process and Measurement*, 96 JUDICATURE 65 (2012); Gill, Lazos & Waters, *supra* note 37; Elizabeth Tomsich & Mary Guy, *Perceptions of Authority: How Gender Affects Citizen Ratings of Judges*, 46 ADMIN. & SOC’Y 471 (2014).

54. See Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 L. & SOC. INQUIRY 137 (2010); Tom Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 L. & SOC’Y REV. 51 (1984); Tom Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC’Y REV. 103 (1988); THE COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, GUIDE TO JUDICIAL CONDUCT (2007); Gleeson, *supra* note 24.

55. See Gleeson, *supra* note 24; COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *supra* note 54.

Four primary research questions drive the direction and methods of the Project's response to these important trends. They are:

1. What are the formal rules and informal norms that govern emotions in the performance of the judicial role?
2. What kinds of emotions, emotional expression, and emotion-related judicial behavior, including emotion-management strategies, actually occur in court proceedings?
3. How do judicial officers experience and understand the role of emotions in their work?
4. How can judging and judicial performance be conceptualized to take account of the place of emotion in the everyday work of judicial officers?

Next is a description of the relevant data available in Australia and in the United States and a preliminary assessment of what that data can reveal in relation to the four questions. The different types, quality, and quantity of data available from each country will be a critical element in the comparative aspect of the Emotions and Judging Project.

A. AUSTRALIAN DATA

Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary on a national basis.⁵⁶ The projects have used interviews, surveys, and observation studies to investigate the attitudes of magistrates and judges toward their work, their experiences of their

everyday work, and the ways matters are handled in court.⁵⁷ Taken together, these varied data sources provide extensive information on judicial emotional experiences and on the ways emotion appears in the interactive dimensions of the courtroom.⁵⁸ In particular, the Judicial Research Project's National Court Observation Study has collected data on several aspects of the interactive dimensions of the courtroom, especially judicial demeanor.⁵⁹

B. UNITED STATES DATA

The last large-scale national study of United States judges was conducted in the late 1970s.⁶⁰ More recently, evaluations of problem-solving courts have involved observations and surveys of judges and participants. There is no equivalent to the Judicial Research Project's rich data archive of social science research on which to build an analysis that can meaningfully address the research questions. Instead, the starting point for the United States is two sources of publicly available information that can be used to identify the role emotion plays in disciplinary actions.⁶¹

The archive of the Center for Judicial Ethics is the only national source of information on such disciplinary actions.⁶²

The Emotions and Judging Project addresses these tensions by examining the ways judicial officers experience and display emotion and assesses the implications for legitimate judicial performance and its evaluation.

56. In Australia's system of government, federal courts operate at the national level, and separate court systems exist for each of the six states and two territories. All states and territories have a supreme court as well as a magistrates or local court. Magistrates courts adjudicate less serious criminal charges and lower-value civil cases, including small claims, and hear the first stages of all criminal cases. Australian magistrates are paid judicial officers with legal qualifications and are appointed until a fixed retirement age. Sharyn Roach Anleu & Kathy Mack, *The Professionalism of Australian Magistrates: Autonomy, Credentials, and Prestige*, 44 J. SOC. 185 (2008). They sit alone without juries in metropolitan, regional, and remote areas; those who appear in these courts are often unrepresented. Over 90% of all civil and criminal cases are initiated and finalized in the lower courts. AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, *Court Administration*, in REPORT ON GOVERNMENT SERVICES (2016); Kathy Mack & Sharyn Roach Anleu, *'Getting Through the List': Judgecraft and Legitimacy in the Lower Courts*, 16 SOC. & LEGAL STUD. 341 (2007). There are approximately 160 judicial officers in Commonwealth courts, 400 state and territory judges, and 450 state and territory magistrates totaling over 1,000 judicial officers, organized into over 25 different courts. In this article, the term "magistrate" refers to members of the Australian judiciary who preside in the first instance or lower state and territory courts, and "judge" indicates those who preside in the higher (intermediate and supreme) state and territory courts or national courts. The terms "judiciary" and "judicial officer" are used more generally. For more information, see <http://www.flinders.edu.au/law/judicialresearch>.

57. See Sharyn Roach Anleu et al., *Researching Emotion in Courts and*

the Judiciary: A Tale of Two Projects, 7 EMOTION REV. 145 (2015).

58. Mack & Roach Anleu, *supra* note 54; Roach Anleu & Mack, *supra* note 6.

59. Mack & Roach Anleu, *supra* note 54; Mack & Roach Anleu, *supra* note 56.

60. JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLE AND PERFORMANCE* (1980).

61. States differ in the point at which a judicial-discipline proceeding becomes public knowledge and whether the fact-finding hearing is public. In 35 states, the fact-finding hearing is held in public. Of those states, in 28 the hearing becomes public when formal charges are filed, in 5 when answers to formal charges are filed, and in 2 when the public hearing is announced. In the remaining 15 states (and D.C.) where the fact-finding hearing is confidential, in 13 confidentiality is maintained until recommendations for public discipline are filed, and in 3 confidentiality only ends when the court orders public discipline. National Center for State Courts, *When Confidentiality Ceases in Judicial Discipline Proceedings*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/When-confidentiality-ceases.ashx>.

62. The Center for Judicial Ethics' *Judicial Conduct Reporter* quarterly "summarizes recent decisions and advisory opinions, reports developments in judicial discipline, and includes articles on judicial ethics and discipline procedure topics. The winter issue (the first one in the year) reviews the previous year." On its blog, the Center provides an update each Tuesday of all newly issued public admonishments, reprimands, and removals.

Here, the focus is on three excerpts from public disciplinary actions as a first look at judicial misconduct related to emotions

The Center's director, Cynthia Gray, kindly provided the authors with descriptions of 78 disciplinary cases in the Center's archive of disciplinary actions during the years 2011 to 2014. These included examples of "improper judicial demeanor by a judge on the bench" as well as incidents that relate to "abuse of contempt power," which can be seen as expressions of anger.⁶³

The Project team will supplement this national source by accessing the online detailed public records of the Arizona Commission on Judicial Conduct. Arizona appears to maintain the most comprehensive publicly available descriptions of the specific events underlying the behavior that led to a public finding of misconduct. These public records allow us to place disciplinary actions based on judicial emotions into a wider context of discipline based on other behaviors.⁶⁴

Disciplinary action against Australian judges and magistrates is initiated through misconduct proceedings and generally becomes public knowledge only when it results in an attempt to remove the judicial officer from office. This usually requires a resolution of both houses of the parliament.⁶⁵ New South Wales and the Australian Capital Territory are the only jurisdictions with a formal misconduct process that provides public information on serious disciplinary complaints and their outcomes.⁶⁶ However, such proceedings are very rare. In other states and territories, misconduct complaints are dealt with informally and do not enter the public record. The specific nature of misconduct proceedings and the criteria defining misconduct vary by the state or territory in which a complaint is filed and by the level of court on which a judge serves.⁶⁷

This article looks at some examples of disciplinary actions drawn from the United States' Center for Judicial Ethics' national archive as a way to identify themes that might answer some of the Project's research questions. The examples of disciplinary actions based on emotions relate to the situation in the United States, taking advantage of what can be learned from emotional displays or reactions that led to a complaint being filed with a disciplinary body and ultimately made public. Such archives of public actions provide excellent sources of data for researchers concerned with judicial work as well as with showing how a state judiciary can demonstrate its accountability to the public. For the Emotions and Judging Project, the archives make it possible to conduct comparative research on emotions in judging in both Australia and the United States.

IV. WHAT DOES JUDICIAL MISBEHAVIOR BASED ON EMOTIONS LOOK LIKE?

This section provides an overview of what can be learned from the two data sources available to study emotions and judging in the United States, starting with the national archive and then looking at the information available from Arizona.

A. CENTER FOR JUDICIAL CONDUCT ARCHIVES

Under the ABA Model Code of Judicial Conduct, ways in which judges can behave intemperately leading to disciplinary action include "rude and abusive behavior, biased comments, misuse of the contempt power, and treatment of court staff, including sexual harassment."⁶⁸ Here, the focus is on three excerpts from public disciplinary actions as a first look at judicial misconduct related to emotions and a sense of the kinds of issues likely to be important to the Emotions and Judging Project.⁶⁹ These examples are chosen to illustrate research themes rather than to provide a comprehensive or representative overview of the range of cases that entail emotion display and judicial misconduct. Each example is followed by comments on the issues raised about the study of emotions and judging.

1. Anger Acknowledged But Continued⁷⁰

The first example comes from West Virginia in 2012 and relates to divorce proceedings. The judge began with the following interchange with Complainant 1:

Judge: Before we get started . . . , if you say one word out of turn you're going to jail . . . do you understand me? Yes or no?

Complainant 1: Yes.
Judge: After we closed here you went out there talked to a reporter . . . five seconds after you left here. . . . This morning I now see an article from your little buddy Smith with a picture of my home . . . my home on the front page.

Complainant 1: [inaudible]
Judge: SHUT UP! [sound distortion] Did I tell you to speak? My wife is disabled, she is there alone . . . and you, you disgusting piece of . . . you put our picture of my house . . . because of you . . . my house has been vandalized four times[.] [Y]ou realize that of course because I'm sure you're probably in on it laughing about it. I swear to you. You're responsible. You are responsible.

63. E-mail from Cynthia Gray, Director, Center for Judicial Ethics, to the authors (May 29, 2015) (on file with the authors).

64. Rebecca Berch & Erin Bass, *Judicial Performance Review in Arizona: A Critical Assessment*, 4 ONATI SOC.-LEG. SERIES 927 (2014).

65. Roach Anleu, Mack & Tutton, *supra* note 49, at 631; Kathy Mack & Sharyn Roach Anleu, *The Security of Tenure of Australian Magistrates*, 30 MELBOURNE U. L. REV. 370 (2006).

66. Roach Anleu, Mack & Tutton, *supra* note 49.

67. *Id.* at 629-38.

68. GRAY, *supra* note 22, at 4.

69. For an earlier effort of this kind that is focused on "judicial rudeness," see Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949 (2013).

70. *In re Watkins*, No. 12-1008 (W. Va. Mar. 26, 2013), available at www.courtswv.gov/supreme-court/docs/spring2013/12-1008.pdf.

ble. I am holding you personally responsible for anything that happens at my house. . . . It's disgraceful that you and your little buddies do not have the guts, the integrity, just the human decency, but no you gotta threaten my family now, well buddy, [it's] personal . . . it is personal. You have threatened my family and I promise you you will not hear the end of it from me. In fact. I'm going to recuse . . . I tell you I'm too angry to even be appropriate in this case.

Moments afterward, the judge apologized to Complainant 1's ex-wife and her counsel and decided not to recuse himself from the case. The judge continued the hearing, later accusing Complainant 1 of telling "a damn lie and you know it's a damn lie." Several times when Complainant 1 attempted to speak, the judge cut him off and told him to "shut up."⁷¹

In this interaction, the judge allowed personal feelings to influence his courtroom conduct, including starting the proceedings with an explicit threat to incarcerate one of the parties. The judge commenced hearing the matter with a display of anger and a threat.⁷² This display of emotion was reactive. The complainant had talked with a reporter, and, as a result, a photo of the judge's house appeared in the newspaper. The judge linked this behavior with the subsequent vandalization of his house and fear for the safety of his wife, resulting in the display of anger in the courtroom. In the transcript, the judge acknowledges that he is angry and unable to be impartial but decides to continue hearing the case, despite the earlier claim that he would recuse himself, and almost immediately resumes his inappropriate conduct toward one of the parties.

The Judicial Hearing Board considered this incident among other complaints about the judge's behavior. The judge was found to have violated the West Virginia Code of Judicial Conduct. The Supreme Court of Appeals of West Virginia accepted the Board's recommended sanction: censuring the judge for 24 violations and suspending him without pay until the end of his judicial term (another four years).

2. Antagonism Toward a Courtroom Participant⁷³

The second excerpt, from New Jersey in 2011, involved the filing of cross-complaints for restraining orders from Ms. P and Mr. P. The New Jersey Supreme Court's Advisory Committee on Judicial Conduct summarizes:

[A]fter [the judge] granted Ms. P's request for an adjournment to provide her the opportunity to obtain counsel, Mr. P. brought up the fact that he had not seen the couple's four-year[-]old child for approximately one week. . . . After asking Mr. P. several questions about his living arrangements, [the judge] asked Ms. P., "Why shouldn't [Mr. P.] see his daughter?" . . . [The judge] thereafter insti-

tuted a temporary visitation schedule for Mr. P., which was set to expire on January 7, 2010, the day of the parties' next court date. . . .

When Ms. P. indicated that her daughter was "not used to being with her father" for the length of time scheduled, [the judge] asked Ms. P. why she would have a problem allowing her daughter to spend time with her father when she had "no problem sending [her] daughter to a preschool where the first day she went, she was with total strangers." . . . The dialogue between [the judge] and Ms. P. continued as follows:

Ms. P.: You don't need to yell at me, please.

Judge: Ma'am, don't talk. You've got a problem with your daughter seeing her father?

Ms. P.: Yes, I do, yes, I do, Your Honor, yes, I do.

Judge: Well, ma'am, let me tell you something.

Ms. P.: I do.

Judge: You need some serious help.

Ms. P.: Okay.

Judge: Because you have no clue what it is to be a parent.

Ms. P.: Okay. He has a severe mental illness.

Judge: Ma'am, keep your mouth quiet. When I talk, you listen. Don't you dare talk back to me. I don't know who you think you're talking to, but you do not dare talk back to me. You understand that?

Ms. P.: Yes.

Judge: Then obey it. I'm not some friend of yours out on the street. I'm a Superior Court judge that demands the respect of my position, and you will give it to me. And you will not convince me that it's okay for your daughter to go spend time with strangers, but can't with her own father, because you know what you forgot? Let me remind you. There's only one reason why he's her father, that's the decision you made.

Ms. P.: And it was a bad one.

Judge: Ma'am—so, what does that tell me about your judgment? If you made a bad decision choosing him as a father, why should I believe anything about your judgment today? Well, you just admitted, you've got bad judgment.

Ms. P.: I made a mistake. We all make mistakes, I'm human.

In this interaction, the judge allowed personal feelings to influence his courtroom conduct, including starting the proceedings with an explicit threat to incarcerate one of the parties.

71. *Id.* at 17-19.

72. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012).

73. *In re Baker*, No. ACJC 2010-151 (N.J., May 2, 2011) (Present-

ment), available at <http://www.judiciary.state.nj.us/pressrel/ACJC%20Presentment%20Max%20A%20Baker.pdf>.

The judge clearly took sides in the custody dispute largely based on his own belief about best practices . . . and berated the party with whom he disagreed.

Judge: And you're making a huge mistake when you tell me today that you don't think your daughter deserves to be with her father.

Subsequently:

Judge: Ma'am, don't talk back to me. Who do you think you are? Any parent that takes steps to limit the other parent's time with the child

doesn't qualify to be a parent. You want to do what's good for your daughter, encourage her to go spend time with her father. That's her father. Not a stranger. He has equal rights, as you. You don't get any preference because you're her mother. And if you made a mistake, too bad. We're not going to punish your daughter today because of your poor judgment, and I'm not going to allow your poor judgment to continue. You understand that?

Ms. P.: Um hum.

Judge: When you come back on the 7th, you'd better hope that we don't hear there's been a problem with these three short periods of time, because if it was up to me, I was going to allow him to have your daughter from now until next Wednesday.

Ms. P.: She wouldn't go.

Judge: Oh, yes, she would. Oh, yes, she would. Because you don't understand, when I order it, it happens. It's not a request of you, it's an order. You know what happens if you disobey a court order? Ma'am, do you know what happens?

Ms. P.: Yes, I understand what happens.

Judge: You'll be sitting over there with this guy right here [referring to a shackled prisoner sitting in the courtroom]. This is not a request. I am telling you, it will happen.

Ms. P.: Okay, Your Honor.

Judge: And I am telling you—

Ms. P.: Okay.

Judge: —there will be consequences if you interfere with it. We understand each other?

Ms. P.: Yes.

Judge: All right. . . . Sir, enjoy your time with your daughter.⁷⁴

The New Jersey Supreme Court reprimanded the judge for making extreme and excessive remarks, in a loud, hostile, angry, and antagonistic manner, to a mother after she questioned a visitation schedule.⁷⁵

The judge clearly took sides in the custody dispute largely based on his own belief about best practices in child rearing and berated the party with whom he disagreed. The disciplinary committee relied heavily on the tone and volume of voice exhibited by the judge, noting that “the audio recording of the . . . proceeding was instrumental” in its decision to discipline the judge. Unlike the case above, the emotion display here does not seem to have been triggered by the actions of the applicant. The judge's decision is cast as a series of threats. If the daughter and mother do not comply with the court order, the judge indicates: “You'll be sitting over there with this guy [a shackled prisoner].” This threatening language is perhaps used to invoke the emotion of fear on the part of the mother.

3. Judicial Overreach⁷⁶

In the next example, the judge's statements and interchange with the prosecutor display anger and frustration. The judge went so far as to threaten contempt proceedings, thus silencing the prosecutor. The police chief filed a grievance, and the State of New Hampshire Judicial Conduct Committee describes the complaint:

[I]n the context of a criminal matter . . . wherein the defendant appeared *pro se* for a trial on a Class B misdemeanor, [the judge] informally inquired of the defendant as to whether he had any evidence showing that his driver[']s license was not suspended. Following colloquy in open court between the Court and the defendant, [the judge] asked the defendant whether he would like to hear any more evidence. When the police prosecutor . . . objected reminding the Court that [the State] had not proffered any evidence, . . . [the judge] informed the prosecutor that the State had indirectly put forward its evidence. When the prosecutor continued to request that the Court move forward with trial of this matter, [the judge] responded . . . , “Be quiet. Be quiet. OK? Hey. When you sit up here you can decide. All right? Be quiet. Listen, one more time, be quiet. One more time, and I'm going to have these folks take you out of here, OK? There is a certain protocol—certain protocol you have? Certain protocol that I have. And you are stepping over the line. Don't step over the line.” When the prosecutor further attempted to address the Court, [the judge] responded: “One more time, one more time, one more time and you're out of here. You decide. You decide.” Under the threat of an apparent contempt finding, the prosecutor said nothing further.⁷⁷

In this example, the judge's responses seems disproportion-

74. *Id.* at 4-7.

75. *In re Baker*, No. ACJC 2010-151 (N.J., May 2, 2011) (Order), available at <http://www.judiciary.state.nj.us/pressrel/D-95-10%20Baker%20Reprimand%20ACJC.pdf>.

76. *In re Jones*, No. JC-10-069-C (N.H. Jud. Conduct Committee, July

9, 2011) (Reprimand), available at <http://www.courts.state.nh.us/committees/judconductcomm/docs/ADMNReprimand-JudgeMichaelJones.pdf>.

77. *Id.*

ate to the prosecutor's reminder that the State "had not proffered any evidence" and request to continue with the trial. The judge's comments suggest his anger was caused by the prosecutor's intervention before the defendant could answer, which he perceived as disrupting court hierarchy, thereby questioning judicial status. The judge's anger is framed as reinforcing judicial authority: "When you sit up here you can decide." The judge is delineating the professional boundaries between the judiciary and the prosecution. By closing his demands with the questions "OK?" and "All right?" and the threat of contempt proceedings, the judge obtains the prosecutor's compliance and further demonstrates to the defendant (and others in the courtroom) that the judge controls the proceedings and the participation of other participants.

The New Hampshire Judicial Conduct Committee found that the judge had violated several Canons of the Code of Judicial Conduct and ultimately issued a reprimand. It also determined that "no . . . violations will recur by virtue of [the judge's] retirement" and that "the violations [were] not of a sufficiently serious nature to warrant the imposition of formal discipline by the court."⁷⁸

B. A FOCUS ON ARIZONA

The examples above are derived from the Judicial Conduct Center's database that seeks to include all public sanctions against a judge. The cases in that national database reflect a variety of state codes of judicial conduct and disciplinary systems.⁷⁹ For consistency in such arrangements, a focus on a single state seemed the best source for preliminary analysis. Examination of the judicial conduct commissions and their actions led to selecting Arizona for a closer look at the role of emotions in provoking public disciplinary actions. One advantage is that the Project can draw on all disciplinary actions over a specific time period and select the ones meeting criteria for discipline based on emotional displays. The Arizona Commission on Judicial Conduct, via its webpage, provides information on the numbers of complaints per year and their outcomes: dismissal of the complaint or sanction of the judicial officer, such as reprimand, censure, suspension, or removal. In cases involving a sanction, the Commission typically provides a copy of the complaint, a response to the notice of complaint prepared by the judge or the judge's lawyer, which is often detailed, and its order outlining the ways the behavior and demeanor of the judge contravened the Code of Judicial Conduct. Thus, while formal sanctions are rare,⁸⁰ these cases provide rich and detailed information on judicial performance and emotion display.

Both the Center for Judicial Ethics and the Arizona data represent only the tip of the iceberg of judicial discipline and an even smaller subset of judicial behavior generally.⁸¹ While that

may limit what can be directly or obviously discerned about the wider or general role of emotions in judicial behavior, these materials do assist in addressing the Emotions and Judging Project's research questions.

The disciplinary cases can help clarify the scope and extent of the formal and informal norms that govern emotion and judicial behavior. This is an example of studying "extreme cases," which has both advantages and limitations.⁸² One highly influential statement on the value of extreme cases argues:

[A]typical or extreme cases often reveal more information because they activate more actors and more basic mechanisms in the situation studied. In addition, from both an understanding-oriented and an action-oriented perspective, it is often more important to clarify deeper causes behind a given problem and its consequences than to describe the symptoms of the problem and how frequently they occur.⁸³

On that basis, the data sources available to us in the United States can offer a tentative window into the role of emotions in judicial behavior at the extreme.

V. CONCLUSION

Historically, judging has been presented as unemotional, emphasizing legal rules and reason to the exclusion of feeling and emotion. That is not currently, if it ever was, a valid description of how judges make decisions and behave in the courtroom. Emotion is inherent in all human behavior and is embedded in social interaction, including in the courtroom.⁸⁴ The actual desirability of viewing the judicial role as unemotional is being challenged by the changing nature of judicial work and by the greater understanding of the positive role emotions can have in generating better case outcomes and improved public trust at a time in which it is increasingly required.

This article offers a first look at the goals and current direction of the Emotions and Judging Project. One important direction is to learn from public records of judicial disciplinary actions in the United States. Over the life of the Project, the ability to make comparative statements about Australia and the

The actual desirability of viewing the judicial role as unemotional is being challenged by the changing nature of judicial work and by the greater understanding of the positive role emotions can have

78. *Id.* at 7.

79. See Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 407, 417 (2007).

80. See *id.* at 417.

81. To put these numbers in context, public disciplinary actions are rare. In 2015, for example, only 27 states issued any such actions; the annual national total was 115 public disciplinary actions, compared to a total of 122 actions in the preceding year. *State*

Judicial Discipline in 2015, JUD. CONDUCT REP., Spring 2016, at 1; *State Judicial Discipline in 2014*, JUD. CONDUCT REP., Winter 2015, at 1. (Data on file with authors.)

82. See Bent Flyvbjerg, *Five Misunderstandings About Case-Study Analysis*, 12 QUALITATIVE INQUIRY 219 (2006).

83. *Id.* at 229.

84. Sharyn Roach Anleu et al., *Observing Judicial Work and Emotions: Using Two Researchers*, QUALITATIVE RES. (forthcoming).

[J]udges appear to have few or no clear statements as to what constitutes appropriate demeanor and emotional display.

United States will grow as more data are collected.

Some observations can be made on the role of emotions in judging and on ways the study of emotions relates to current work on procedural fairness and the challenge of conducting meaningful assessments of judicial performance.

First, the value of research focusing on the emotional component of judging is evident. The role of emotion can be seen positively

as intrinsic to adapting to some of the major changes now taking place in judging. Enhancing the ability of judges to regulate their emotions can assist in managing difficult court situations, such as with self-represented litigants and during the presentation of victim-impact statements.⁸⁵ Judicial emotional display can be a positive factor in achieving desired outcomes such as reduction in recidivism and increased compliance with court orders, especially in problem-oriented courts. On the other hand, it is clear that inappropriate emotional display is an important factor in some of the most serious disciplinary actions taken in the United States—and perhaps in less serious complaints as well.

Second, the potential for insights from studying “extreme cases” such as public disciplinary actions seems clear. The work of states like Arizona and the Center for Judicial Conduct, in generating and collating public records of state actions, provides important statements of judicial accountability and enables valuable empirical research on the role of emotion in judicial behavior. Anger and other emotions appear to cause some judges to step out of a proper judicial role and engage in retribution against or mistreatment of individuals present in the courtroom. This is not confined to persons who are directly before the court; those in the public gallery can be the target of judicial misbehavior. Even recognizing and acknowledging an inability to regulate emotions in a particular case does not necessarily prevent a continuation of the improper behavior on the part of the judge. Emotions can be the basis of or the means to make evident a judge’s partiality toward one of the parties to a case.

Third, in both the United States and in Australia, judges

appear to have few or no clear statements as to what constitutes appropriate demeanor and emotional display. Rules of conduct tend to be worded in generalities even when commentaries are presented.⁸⁶ An important goal of issuing public disciplinary actions is to provide judges with specific guidance through examples of what constitutes behavior prohibited by the official rules of conduct.⁸⁷ Systematic study of these “extreme cases” can help provide such guidance. However, these sources are limited in their ability to provide guidance on positive emotional expression or experience.

Fourth, another potential source of specificity available to judges in some states are elements of judicial performance evaluation processes. Questions asked in judicial performance evaluation surveys or express criteria used in systematic observations of judges in their courtrooms can clarify expectations. That potential is unrealized for the most part because of the low quality of most existing surveys and the untested status of the observational protocols.⁸⁸ Judicial performance ratings can be affected by the gender⁸⁹ and race of the judge and of the observer(s), particularly with respect to different interpretations of the judge’s demeanor in the courtroom.⁹⁰ This may especially be the case in relation to emotions, as the expected experience and display of emotion are deeply gendered and raced.⁹¹ As a result, judicial performance evaluations might reflect implicit gender and racial/ethnic bias. Research into emotion and judicial performance can potentially improve programs developed to evaluate judicial performance.

Fifth, there are also important positive links between emotion and judicial performance. The emotional state of a decision maker can influence or mediate the perception of fairness or its absence in the courtroom on the part of the decision recipient. Research shows that “people’s emotional state at the time of making procedural justice judgements can determine whether or not they perceive an encounter with an authority to be procedurally fair or not.”⁹² Therefore, a judge’s appropriate display and regulation of emotions may underpin the role procedural fairness plays in satisfaction with general court proceedings and in the success of new court forums like adult drug courts in reducing recidivism and increasing compliance with court orders.⁹³

Understanding links between emotion and procedural fairness offers judicial performance programs criteria that are

85. Tracey Booth, ‘Cooling Out’ Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court, 45 AUSTL. & N.Z. J. CRIMINOLOGY 214 (2012); Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14 (2016).

86. For example, the ABA Model Code of Judicial Conduct states in Rule 2.8(B) that “[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.” Judges are largely left to establish their own criteria for what is dignified and what is courteous. MODEL CODE OF JUD. CONDUCT, r. 2.8 (AM. BAR ASS’N 2011); see also COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *supra* note 54.

87. In the United States, the *Judicial Conduct and Ethics* series provides updates of disciplinary decisions relevant to specific canons.

See CHARLES GEYH ET AL., JUDICIAL CONDUCT AND ETHICS (5th ed. 2013).

88. See Elek, Rottman & Cutler, *supra* note 5.

89. See, e.g., Gill, Lazos & Waters, *supra* note 37.

90. See Tomsich & Guy, *supra* note 53.

91. See, e.g., Adia Harvey Wingfield, *Are Some Emotions Marked “Whites Only”? Racialized Feeling Rules in Professional Workplaces*, 57 SOC. PROBLEMS 251 (2010).

92. Flyvbjerg, *supra* note 82, at 212; see also Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652 (2008).

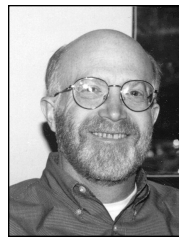
93. See ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY (2011), available at http://www.courtinnovation.org/sites/default/files/documents/MADCE_ES.pdf; Maroney & Gross, *supra* note 1.

potentially better related to judicial performance in terms of perceived fairness, compliance and cooperation with court orders, and public satisfaction with and trust in the judiciary.⁹⁴



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94. Jennifer Elek & David Rottman, *Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods*, 49 CT. REV. 140 (2013).

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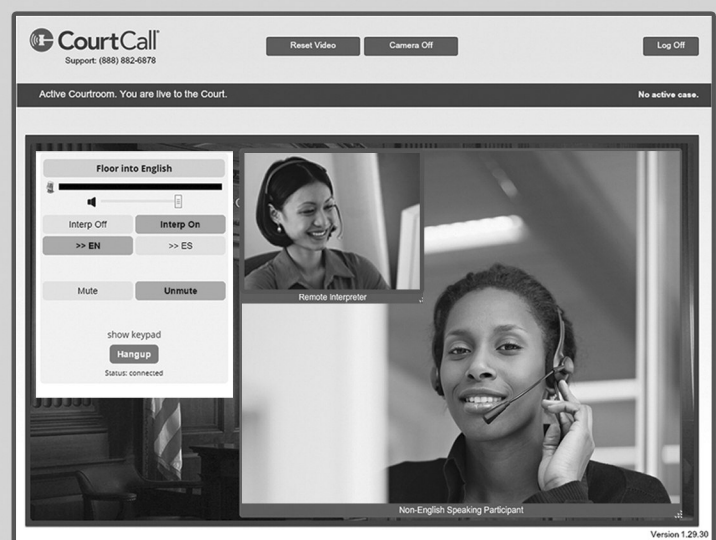
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Judicial Wisdom:

An Introductory Empirical Account

Jeremy A. Blumenthal & Daria A. Bakina

For millennia, the notion of “wisdom” has been the purview of philosophers or religious scholars. Philosophers literally loved and sought wisdom; biblical scholars lionized King Solomon, wisest man of all.¹ More recently, however, psychologists have begun to investigate the concept of wisdom empirically. Beginning in the mid-1970s and proceeding apace,² social scientists have studied wisdom from a variety of perspectives, falling under two headings of implicit and explicit theories.³

IMPLICIT THEORIES OF WISDOM

At least three different approaches have been taken to the development of implicit theories of wisdom. One thread of research, probably the most common, uses a three-step factor-analysis approach: one sample of participants is asked to generate a list of traits or characteristics of wisdom generally or of a wise person. Another sample rates that list of traits on, for example, how typical each is of wisdom or of a wise person, and the resulting ratings are then factor analyzed to identify and articulate the underlying dimensions.⁴

Such studies generally converge on a small set of qualities, dimensions, or clusters that are seen to represent aspects of wisdom or the wise person.⁵ Almost all identify a strong cognitive component to wisdom—intelligence, reasoning ability, knowledge, experience, or problem solving. Over and above this intelligence, however, participants typically identify some sort of exceptional insight as a hallmark of wisdom. Most also identify a reflective component—introspection, intuition, ability to learn from mistakes, even temperament (with some of these qualities overlapping with the “exceptional insight” element). A fourth trait, which all these studies identify, is affective, dealing with interpersonal relations and a concern for others. Finally, at least two studies identify some real-world problem-solving abil-

ity—having good judgment, being able to apply it in real life, giving good advice.⁶ This last is closely connected to Aristotle’s concept of *phronesis*, discussed briefly below.

A second implicit-theory approach asks participants to nominate wise people, typically but not necessarily those known to the participant, and then studies traits of the nominee or asks the nominee to engage in some sort of wisdom-related activity so that wise features can be identified.⁷ A third, less common, approach experimentally manipulates aspects of wisdom or of wise people to tap participants’ intuitions. For instance, Francis Hira and Patricia Faulkender showed subjects videotapes of individuals speaking about wisdom-related life problems, varying the age and gender of the speaker but not the content of the presentation.⁸ Participants in that study rated older men and younger women as more wise, implicating, perhaps, cultural stereotypes about the wise person rather than a particular idea of wisdom itself (although the authors attributed their findings in part to nonverbal cues enacted by the speakers).

EXPLICIT THEORIES OF WISDOM

Two of the more prominent explicit psychological theories are the Berlin Wisdom Paradigm (BWP) and Sternberg’s Balance Theory.⁹ Both emphasize elements of historical discussions of wisdom, and both emphasize a conception of wisdom as roughly analogous to expert functioning in a domain.

The former, growing out of a life-span-development approach that emphasizes successful aging, defines wisdom as “expert knowledge in the fundamental pragmatics of life that permits exceptional insight, judgment, and advice about complex and uncertain matters” and as “expertise in the conduct and meaning of life.”¹⁰ The BWP defines wisdom in terms of a broader construct rather than a personality characteristic.¹¹ Wise individuals approximate the ideal of wisdom and serve as

Footnotes

1. G. BRUGMAN, WISDOM: SOURCE OF NARRATIVE COHERENCE AND EUDAIMONIA 78-82 (2000).
2. Monika Ardelt, *Foreword* to A HANDBOOK OF WISDOM: PSYCHOLOGICAL PERSPECTIVES, at xi (Robert J. Sternberg & Jennifer Jordan eds., 2005).
3. Susan Bluck & Judith Glück, *From the Inside Out: People’s Implicit Theories of Wisdom*, in A HANDBOOK OF WISDOM: PSYCHOLOGICAL PERSPECTIVES 84, 86 (2005).
4. Bluck & Glück, *supra* note 3, at 95; Ursula M. Staudinger, *A Psychology of Wisdom: History and Recent Developments*, 5 RES. HUM. DEV. 107, 109 (2008).
5. Bluck & Glück, *supra* note 3, at 95.
6. STEPHEN G. HOLLIDAY & MICHAEL J. CHANDLER, WISDOM: EXPLORATIONS IN ADULT COMPETENCE 31 (1986); Robert J. Sternberg, *Implicit Theories of Intelligence, Creativity, and Wisdom*, 49 J. PERSONALITY & SOC. PSYCHOL. 607, 613 (1985).
7. Paul B. Baltes et al., *People Nominated as Wise: A Comparative*

Study of Wisdom-Related Knowledge, 10 PSYCHOL. & AGING 155, 157-59 (1995).

8. Francis J. Hira & Patricia J. Faulkender, *Perceiving Wisdom: Do Age and Gender Play a Part?*, 44 INT’L J. AGING & HUM. DEV. 85, 90 (1997).
9. Paul B. Baltes & Ursula M. Staudinger, *Wisdom. A Metaheuristic (Pragmatic) to Orchestrate Mind and Virtue Toward Excellence*, 55 AM. PSYCHOLOGIST 122, 123-25 (2000); Paul B. Baltes et al., *Wisdom and Successful Aging*, 39 NEBRASKA SYMPOSIUM ON MOTIVATION 123, 128-29 (1992); Robert J. Sternberg, *A Balance Theory of Wisdom*, 2 REV. GEN. PSYCHOL. 347, 349-50 (1998).
10. Baltes & Staudinger, *supra* note 9, at 124; M. Pasupathi et al., *Seeds of Wisdom: Adolescents’ Knowledge and Judgment About Difficult Life Problems*, 37 DEVELOPMENTAL PSYCHOL. 351, 351 (2001).
11. See Monika Ardelt, *Wisdom as Expert Knowledge System: A Critical Review of a Contemporary Operationalization of an Ancient Concept*, 47 HUM. DEV. 257 (2004), for an excellent overview and critique.

guideposts, and the role of psychological theory is to study how people can be described as wise.¹² The BWP designers are more interested in the big-picture concept of wisdom as a “collectively anchored product”;¹³ others seem more interested in identifying, among other things, the individual differences associated with wisdom, wise people, wise decision processes, and wise outcomes.¹⁴ Of course, there seems no *a priori* reason not to study both.¹⁵

The second prominent explicit theory of wisdom is Sternberg’s Balance Theory, which involves a foundation of general knowledge or academic intelligence, on which is rested tacit knowledge or practical intelligence.¹⁶ First, wisdom inheres in the interaction between a person and his situation. Sternberg’s take on whether individuals can be wise is not clear from this point; on the one hand, he seems to focus on wisdom as process-focused. On the other hand, he often does refer to “wise people,” “people who acquire wisdom,” and individual differences in both variables predicting wisdom and affecting the balancing process.¹⁷ Second, an individual’s decision making is not wise or unwise (foolish) *per se*; rather, its “wisdom depends on the fit of a wise solution to its context.” Third, as a result, the same sort of balancing of decision-making processes may yield a wise solution in one context but not another. Accordingly, wisdom for Sternberg seems to inhere primarily in a decision’s fit to the situation, rather than in an individual as a personal characteristic (though this is not certain), in a decision-making process, or in an outcome *per se*. As noted below, this question of where to locate wisdom—as a trait, in a process, or in an outcome—is an important definitional issue but also an important one for developing further research.¹⁸

PRACTICAL WISDOM (PHRONESIS)

In the discussion of judicial wisdom, phronesis or practical wisdom is important to note; three aspects are particularly relevant here. First, Aristotle saw phronesis as an executive decision maker, a “master virtue” that tied together and managed the others. But it is also more; it involves the skill to perceive a situation the right way in the first place, recognizing the need for action, and the skill to identify what features of a situation are most relevant and most deserving of further deliberation.¹⁹ Perhaps most important, though, Aristotle saw the deliberation process, as does Sternberg, as having the “good”

as the ultimate objective; that is, phronesis involves deliberation or reflection about valuable goals.²⁰

Second, Anthony Kronman built on Aristotle’s notion of practical wisdom in his efforts to recapture what he saw as the lost ideal of a lawyer-statesman.²¹ Kronman saw practical judgment/practical wisdom/phronesis at the heart of this ideal; political and judicial skill depends on excellence in this character trait. He too emphasized balance and the importance of combining internal decision-making skills—reflective and perceptual elements. That is, practical wisdom was a skill or “capacity” for joining those elements together in the appropriate way.²² The wisdom of a decision cannot be measured solely by its final result but only—as with Sternberg—by whether there is balance between the circumstances of the case and the reasoning about those circumstances.²³ A wise judge need not have particular personal qualities that lead him or her to be a wise judge; rather, he or she has certain dispositions that interact appropriately with the situation at hand and allow the judge to reason his or her way to the best outcome.²⁴

Kronman makes two final points about practical judgment. He states that people’s practical-judgment skill can be developed and believes that an ideal setting for developing the means necessary for developing the skill is law school. The critical thinking, understanding of particulars, sympathy, imagination, and detachment necessary for thoroughly developing phronesis rest comfortably on the Socratic Method so typical of legal education. Kronman, then, sets out two criteria by which the wisdom of outcomes or decisions can be measured. The first is the degree of suitability or fit.²⁵ The second is the degree to which it “promote[s] political fraternity” by accommodating differing viewpoints and maintaining the coherence of a community with those different views.²⁶

Perhaps the most direct application of phronesis to the judicial context is recent neo-Aristotelian work by Lawrence

A wise judge . . . has certain dispositions that interact appropriately with the situation at hand and allow the judge to reason his or her way to the best outcome.

12. Paul B. Baltes & Ute Kunzmann, *The Two Faces of Wisdom: Wisdom as a General Theory of Knowledge and Judgment About Excellence in Mind and Virtue vs. Wisdom as Everyday Realization in People and Products*, 47 HUM. DEV. 290, 292-93 (2004).

13. Baltes & Staudinger, *supra* note 9, at 130.

14. Ardel, *supra* note 11, at 259-60.

15. See Monika Ardel, *Where Can Wisdom Be Found?*, 47 HUM. DEV. 304, 306 (2004).

16. Sternberg, *supra* note 9, at 353.

17. Robert J. Sternberg, *Words to the Wise About Wisdom? A Commentary on Ardel’s Critique of Baltes*, 47 HUM. DEV. 286, 287 (2004).

18. James E. Birren & Cheryl M. Svensson, *Wisdom in History*, in A HANDBOOK OF WISDOM: PSYCHOLOGICAL PERSPECTIVES 3, 25 (Robert J. Sternberg & Jennifer Jordan eds., 2005).

19. Blaine J. Fowers, *Reason and Human Finitude: In Praise of Practical Wisdom*, 47 AM. BEHAV. SCIENTIST 415, 415-16 (2003); NANCY

SHERMAN, *THE FABRIC OF CHARACTER: ARISTOTLE’S THEORY OF VIRTUE*, 58, 123 (1991).

20. Ricardo Parellada, *Aristotle’s Theory of Practical Wisdom*, 83 MOD. SCHOOLMAN 1, 1-3, 6-9 (2005).

21. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 43-44 (1993).

22. Anthony T. Kronman, *Practical Wisdom and Professional Character*, 4 SOC. PHIL. & POL’Y 203, 210 (1986).

23. *Id.* at 55.

24. Chapin Cimino, *Private Law, Public Consequences, and Virtue Jurisprudence*, 79 U. PITT. L. REV. 279, 294-95 (2009).

25. Kronman, *supra* note 22, at 219.

26. KRONMAN, *supra* note 21, at 97; Carlos Silva Marques, *Anthony Kronman on the Virtue of Practical Wisdom*, 15 RATIO JURIS 328, 338-39 (2002).

The virtuous judge possesses multiple judicial virtues—courage, impartiality, incorruptibility, intelligence, and others—but also possesses the ability to manage them.

Solum. Quite simply, judicial wisdom is phronesis; it is practical wisdom, as applied to the decisions a judge makes.²⁷ The virtuous judge possesses multiple judicial virtues—courage, impartiality, incorruptibility, intelligence, and others—but also possesses the ability to manage them.²⁸ The wise judge knows what goals to pursue and how to arrive at those goals.²⁹ According to Solum, phronesis is “the ability to respond appropriately to the particular situation,” to identify what is morally relevant about a

particular situation, and to craft a just resolution. Indeed, for Solum, this synthesis or balancing becomes an exercise of Aristotelian equity: the “tailoring of the law to the demands of the particular situation.”³⁰

The review here details the philosophical and legal writing on practical wisdom, potentially or actually applied to the judicial context. However, very little work has been conducted to translate those theories into empirical testing. One of our goals here is to connect this line of legal and philosophical thinking to empirical work in psychology and lay the groundwork for a fuller program of research synthesizing it all. Thus, we turn briefly now to some of the existing empirical work on wisdom, recognizing a lack of empirical work on judicial wisdom.

PRIOR PSYCHOLOGICAL RESEARCH

First, as mentioned, researchers have studied laypeople’s implicit theories of wisdom.³¹ These studies have elicited broad consensus as to the various components of wisdom—the five elements identified above—and consensus that wisdom involves some sort of integration, synthesis, or balance of those capacities.³² There also seems to be broad agreement in implicit conceptions of wisdom that wise people are usually

old,³³ but there is less agreement, perhaps surprisingly, that men are more typically wise than are women.³⁴

Second, more “top-down” work has focused on explicit theories, on conceptualizing and measuring the wisdom construct. One approach has focused on “general wisdom,” with the paradigmatic examples being the Berlin approach and Sternberg’s model. Another approach has focused more on “personal wisdom,” viewing it as a construct that reflects personal growth, life experience, dealing with life challenges, or ego and identity development.³⁵ Researchers taking the latter approach have sought to develop and validate self-report scales to measure their notion of the wisdom construct. On the one hand, there is often overlap in their theoretical constructs; on the other hand, to the extent personal wisdom involves a substantial amount of self-reflection, self-report may not be the best evaluative measure. Instead, promising efforts have been made to look at “performance-based” measures.³⁶ For judicial-wisdom purposes, general wisdom constructs seem more appropriate to pursue.

Third, researchers have studied the development of wisdom and wisdom-related knowledge over the life span, again distinguishing between general and personal wisdom. Much of this literature has looked to determining whether one type of wisdom might precede the other (apparently not; the development of personal and general wisdom seems to be a dynamic process where either can “take the lead”). Other literature has suggested a model that synthesizes personality correlates of both types of wisdom (creativity, fluid and crystallized intelligence, openness to experience, and others), experiential factors, and sociocultural factors, all of which combine to facilitate the development of wisdom.³⁷

Perhaps surprisingly, neither type of wisdom is directly correlated with age; simply growing older is not sufficient to grow wiser.³⁸ Older individuals produce higher wisdom-related performance in response to dilemmas typical of older age; younger individuals score higher on young-adult-type dilemmas.³⁹ Nor is general wisdom-related performance correlated with well-being,⁴⁰ but negative life events might conduce to increases in personal wisdom.⁴¹

Fourth, of importance for judicial-wisdom issues,

27. Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 *METAPHILOSOPHY* 178, 192 (2003).

28. Lawrence B. Solum, *A Tournament of Virtue*, 32 *FLA. ST. U. L. REV.* 1365, 1376-77 (2005).

29. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 *S. CAL. L. REV.* 1735, 1746 (1998).

30. *Id.* at 1754.

31. Bluck & Glück, *supra* note 3, at 89-90.

32. Ursula M. Staudinger & Judith Glück, *Psychological Wisdom Research: Commonalities and Differences in a Growing Field*, 62 *ANN. REV. PSYCHOL.* 215, 218 (2011).

33. Lucinda Orwoll & Marion Perlmutter, *The Study of Wise Persons: Integrating a Personality Perspective*, in *WISDOM: ITS NATURE, ORIGIN, AND DEVELOPMENT* 160, 170-71 (Robert J. Sternberg ed., 1990).

34. Carolyn M. Aldwin, *Gender and Wisdom: A Brief Overview*, 6 *RES. HUM. DEV.* 1, 5-6 (2009).

35. Staudinger & Glück, *supra* note 32, at 224-26.

36. JESSICA DORNER & URSULA M. STAUDINGER, *SELF-CONCEPT MATU-*

RITY—A NEW MEASURE OF PERSONALITY GROWTH: VALIDATION, AGE EFFECTS, AND FIRST PROCESSUAL EXPLORATIONS 226-28 (2010); Charlotte Mickler & Ursula M. Staudinger, *Personal Wisdom: Validation and Age-Related Differences of a Performance Measure*, 23 *PSYCHOL. & AGING* 787, 787-88 (2008).

37. Ursula M. Staudinger et al., *Wisdom and Personality*, in *A HANDBOOK OF WISDOM: PSYCHOLOGICAL PERSPECTIVES* 191, 210 (Robert J. Sternberg & Jennifer Jordan eds., 2005).

38. Staudinger & Glück, *supra* note 32, at 219; Joel R. Sneed & Susan Krauss Whitbourne, *Identity Processing and Self-Consciousness in Middle and Later Adulthood*, 58 *J. GERONTOLOGY B PSYCHOL. SCI. & SOC. SCI.* 313, 317 (2003).

39. Ursula M. Staudinger et al., *Wisdom-Related Knowledge in a Life Review Task: Age Differences and the Role of Professional Specialization*, 7 *PSYCHOL. & AGING* 271, 277 (1992).

40. Ute Kunzmann & Paul B. Baltes, *Wisdom-Related Knowledge: Affective, Motivational, and Interpersonal Correlates*, 29 *PERSONALITY & SOC. PSYCHOL. BULL.* 1104, 1113 (2003).

41. Mickler & Staudinger, *supra* note 36, at 792.

researchers have examined the “plasticity” of wisdom, i.e., how and whether it might be facilitated or taught. One useful means of facilitating wisdom-related performance as measured in the Berlin paradigm was to discuss the problem at hand with a confidant; this was effective even when that confidant was imagined.⁴² There is an interesting but underexplored connection here with Kronman’s suggestion that the Socratic Method is useful for developing *phronesis*; perhaps even the imagined Socratic dialogue can help individuals exhibit increased wisdom. More direct means, such as instructions to “try to give a wise response,” have generally been found to be ineffective,⁴³ perhaps suggesting some difficulty in introspecting about and tapping into one’s own wisdom-related capabilities. Sternberg is more adamant that wisdom, or at least wisdom skills, can be taught: first, study classic works of literature and philosophy; second, encourage dialogical thinking (perceiving ideas from multiple points of view) and dialectical thinking (recognizing that ideas evolve over time); third, encourage students to self-reflect and develop their own values; fourth, develop all these modes of thinking with an eye to the common good; fifth (again connected with earlier points), encourage a Socratic teaching style; and sixth, have teachers act as role models for wisdom. Sternberg and colleagues developed a curriculum for teaching wisdom in middle schools, laying out an approach and a series of evaluative measures; however, we have not seen published follow-up to these efforts.⁴⁴

Finally, this last point about the educability of wisdom has been extended in applied fields, with researchers exploring the relevance of these explicit theories of wisdom in education and in leadership contexts—management, business, etc. Indeed, Sternberg has developed a model of leadership that synthesizes creativity, intelligence, and his Balance Theory of wisdom.⁴⁵ An appropriate balance will help leaders build on certain strengths and balance the leader’s own capabilities as well as the capabilities of those being led, all to achieve a common good in the relevant field. Other applications to leadership have emphasized situational factors, asking what situations conduce to wise leadership.⁴⁶ Still others emphasize that a wise leader will know what situations call for what leadership style and act appropriately.⁴⁷ More specifically, wise decision making has been studied in the contexts of medicine, nursing,⁴⁸ business,⁴⁹ clinical psychology,⁵⁰ and politics,⁵¹ sometimes drawing explicitly on the models sketched above.

Strangely, perhaps, despite application in these settings, there is no published empirical work examining wisdom in the applied setting of judging—of judicial wisdom—despite the traditional image of the judge as an archetype of wisdom. The only empirical work we have found directly implicating judicial wisdom was an unpublished doctoral dissertation, in which the author administered an existing wisdom scale (Ardelt’s [2003] 3D-WS) to Missouri judges.⁵² She also noted potential implications for using this or other wisdom scales as a tool in (s)electing judges. The studies presented here aim to empirically establish scales of judicial wisdom drawing on the work done by previous philosophers and psychology researchers alike.

[J]udges were asked to generate characteristics of wise judges. Then, law students rated these characteristics on whether they accurately reflected judicial wisdom.

STUDY 1

Methods

The first study was done in two parts, following the most common approach in wisdom research. In the first part, judges were asked to generate characteristics of wise judges. Then, law students rated these characteristics on whether they accurately reflected judicial wisdom.

STUDY 1A

Participants

Forty federal magistrate judges (27 men and 13 women) completed questionnaires during a voluntary session at two judicial-education conferences in 2009. Twenty-three judges participated in Session 1 (first conference) and seventeen in Session 2 (second conference). Judges signed up for a session on “Judicial Decision-Making,” during which they completed a questionnaire and were debriefed. They then heard a general presentation regarding theoretical and empirical research into judicial decision making and engaged in discussion and a question-and-answer session with the presenters. Thirty-four participants self-identified as white, four self-identified as black, and two did not provide an ethnic identification.

42. Ursula M. Staudinger & Paul B. Baltes, *Interactive Minds: A Facilitative Setting for Wisdom-Related Performance?*, 71 J. PERSONALITY & SOC. PSYCHOL. 746, 755-56 (1996).

43. Judith Glück & Paul B. Baltes, *Using the Concept of Wisdom to Enhance the Expression of Wisdom Knowledge: Not the Philosopher’s Dream but Differential Effects of Developmental Preparedness*, 21 PSYCHOL. & AGING 679, 685 (2006).

44. See Robert J. Sternberg, *Why Schools Should Teach for Wisdom: The Balance Theory of Wisdom in Educational Settings*, 36 EDUC. PSYCHOLOGIST 227 (2001).

45. Robert J. Sternberg, *A Systems Model of Leadership: WICS*, 62 AM. PSYCHOLOGIST 34, 39 (2007).

46. Michael J. Limas & Robert O. Hansson, *Organizational Wisdom*, 59 INT’L J. AGING & HUM. DEV. 85 (2004).

47. Leon C. Malan & Mark P. Kriger, *Making Sense of Managerial Wisdom*, 7 J. MGMT. INQUIRY 242 (1998).

48. Andrew McKie et al., *Exploring Clinical Wisdom in Nursing Education*, 19 NURSING ETHICS 252 (2012).

49. Limas & Hansson, *supra* note 46.

50. BLAINE J. FOWERS, *VIRTUE AND PSYCHOLOGY: PURSUING EXCELLENCE IN ORDINARY PRACTICES* (2005).

51. PETER J. STEINBERGER, *THE CONCEPT OF POLITICAL JUDGMENT* (1993).

52. Kathleen A. Mehl Chadwick, *A Study of the Measurement of Wisdom in the Missouri State Judiciary* (July 2007) (unpublished Ph.D. dissertation, Capella University). The author also stated that she had found no studies examining the wisdom of legal professionals.

The analysis yielded four categories of judicial wisdom.

Procedure

Half of the participants were asked to list (among other things) “characteristics of a wise judge.” To assess whether their perceptions involved not wisdom per se but rather competence or skill, the

other half were asked to list “characteristics of an excellent judge.” Participants were asked to provide a variety of demographic and professional information, including age, gender, education, ethnicity, religious affiliation, political-party affiliation, political orientation, number of years in service as a judge, and the federal circuit within which they sat. Judges identified 130 discrete features of a “wise judge” and 142 of an “excellent” judge.

STUDY 1B

Participants

Participants were 286 incoming first-year law students.

Procedure

Participants were given packets of surveys including the 130 discrete features of a wise judge identified by the judges in Study 1A. Participants were asked to rate each one of the characteristics on a Likert scale (1, not at all, to 7, very), as to how accurately the feature captures judicial wisdom.

Results

The first goal was to establish a reliable scale of characteristics of a wise judge. To do this, independent raters grouped the 130 features judges listed in Study 1A by dividing them into 32 categories, with all raters coming to an agreement. The data-analytic strategy used in these analyses includes exploratory and confirmatory factor analyses. Briefly, both types of analyses test the similarity between groups of items.⁵³

Confirmatory factor analysis was then used to derive the most representative feature for each of the 32 categories. Using a confirmatory factor analysis tests whether the items in the

group are related based on a predetermined factor structure. In the next set of analyses, we use the 32 representative characteristics to further classify the characteristics (32) into broader themes of judicial wisdom.

After conducting an exploratory factor analysis, 19 of the original 32 characteristics loaded onto four factors. This procedure reduces the 32 characteristics into categories of similar themes. During this procedure, only items that are highly related are retained (.4 factor loading).⁵⁴ The exploratory factor analysis resulted in 19 characteristics of judicial wisdom having a loading of .4 or greater. The remaining items did not reach this threshold. Five of the items that could have been confusing to participants were dropped from analyses. With one such feature, for instance (“willingness to learn, to challenge and be challenged”), participants could have agreed with the former part of the statement but not with the latter. Two items were dropped due to cross loading⁵⁵ among two or more factors (e.g., “knowledge of the law”), and six items were dropped due to poor loading (e.g., “balances interests of all parties, including judge’s own interests”). These items may have been too broad to be applied to the specific content of what makes a wise judge.

The analysis yielded four categories of judicial wisdom. We interpret the factors broadly as consistent with previous findings described in the implicit-theories literature. Factor 4 reflects the *cognitive*, decision-making skill typically identified. Factor 3 is consistent with the *reflective* characteristic, and Factor 2 with the *interpersonal* or *affective* characteristic. We also identified Factor 1, a quality reflecting wisdom-related skills particular, if not unique, to judges. This may reflect the real-world problem-solving ability that some researchers have found,⁵⁶ or, more interestingly, something over and above conventional perspectives of wisdom that reflects judicial wisdom specifically.⁵⁷

STUDY 2

Method

The goal of the second study was to confirm the structure

53. A factor analysis is a statistical strategy that finds relationships between observed variables. In this case, the observed variables are the characteristics of wise judges. Through correlations among the observed variables, the factor analysis determines commonalities among the items; those assessing the same construct will be grouped together. The formation of this group is called a factor or unobserved variable. In this paper, we discuss two kinds of factor analysis—exploratory and confirmatory factor analysis. An exploratory factor analysis does not require *a priori* hypotheses about how items would be grouped together or how many factors will be derived. As such, this is often the first step in determining how data are organized. The confirmatory factor analysis makes use of *a priori* hypotheses (either derived from a theoretical framework or a previous factor analysis). For our purposes, we used the factor structure obtained in Study 1B as the *a priori* hypotheses about the structure of the data in Study 2.

54. To determine the items that are grouped together in this analysis, one must examine the factor loading for each item, which indicates the strength of its association with the group as a whole. Factor loadings can be thought of as a correlation, and the con-

ventional cutoff is .40. Therefore, those items that have a strong correlation (>.40) with the factor itself are kept with that factor, whereas ones with a weak correlation (<.40) are dropped from that factor. Reasons for low factor loadings can include items assessing a different construct from the factor or an item being worded poorly.

55. Some variables or items may load or be grouped together with multiple factors. This may be an indication of an item being too broad, encompassing multiple constructs. There are many ways of dealing with this both statistically and theoretically. For our purposes, we took a theoretical approach, analyzing each item separately to determine whether it was too broad to fit with the construct.

56. Holliday & Chandler, *supra* note 6, at 62; Sternberg, *supra* note 6, at 613.

57. The full results and detailed statistical analyses can be found in Jeremy A. Blumenthal & Daria A. Bakina, *Judicial Wisdom: An Empirical Account and Research Agenda* (2008) (unpublished article), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129792.

of the wise-judge-characteristic scale and to establish the structure of the excellent-judge scale.

Participants

Participants were a group of 247 incoming first-year law students.

Materials

Wise Judge. Nineteen items were presented assessing characteristics of a wise judge (e.g., “A wise judge is a good listener.”). Items were rated on a Likert scale from 1 (not at all characteristic) to 7 (very much characteristic).

Excellent Judge. Items were taken from Study 1A, and three independent raters grouped the original 142 features into 38 categories. The most representative item in each category was then chosen, resulting in 38 items that were then rated on a Likert scale from 1 (not at all characteristic) to 7 (very much characteristic).

Results

A confirmatory factor analysis was performed on the retained 19 items to find support for the four-factor structure established in Study 1B. This specific data-analytic strategy was chosen to replicate the pattern of abstract concepts (e.g., intelligence, interpersonal skill) through sets of related con-

crete characteristics. The hypothesized model for the factors of judicial skill, people skill, open-mindedness to change, and intelligence were tested as latent factors. In line with previously established work on implicit theories of wisdom, multiple aspects of wisdom were found in this data. Because the same items were clustered together in Study 2 as in Study 1B, the four-factor model was found to be the most appropriate for understanding judicial wisdom.

Excellent Judge Exploratory Factor Analysis

Exploratory factor analysis was conducted on the data obtained for excellent judges. There were initially 38 features identified that resulted in five general categories of characteristics of an excellent judge. Seventeen items were dropped due to poor loading⁵⁸ or cross-loading. The explanation for poor loading of these items could be that they were either confusing to understand (e.g., “involves clients when necessary”), too broad (e.g., “attends to detail”), or double-barreled (e.g., “respects precedents and the rule of law”). It is also possible that the dropped items did not encompass qualities or characteristics unique to excellent judges (e.g., “thoughtful,” “practical”). These 17 items were dropped from the analyses. The final result provided five general categories for characteristics of an excellent judge. A confirmatory factor analysis was performed on a random subset of the data and supported the five-factor solution.

WISE JUDGE, FACTOR ANALYSIS FINAL MODEL

Item	FACTOR LOADINGS			
	1	2	3	4
A wise judge is honest.	0.680			
A wise judge is conscientious about following the law.	0.505			
A wise judge is ethical.	0.718			
A wise judge is diligent in studying evidence.	0.622			
A wise judge is active in the community.		0.567		
A wise judge is interested in the community.		0.445		
A wise judge is caring.		0.507		
A wise judge is spiritual.		0.620		
A wise judge has political skill, in the sense of working well with people.		0.487		
A wise judge is genuinely interested in people.		0.573		
A wise judge is open-minded.			0.620	
A wise judge is willing to admit mistakes.			0.411	
A wise judge is always prepared.			0.428	
A wise judge has empathy.			0.562	
A wise judge is capable of making hard decisions.				0.400
A wise judge is rational.				0.517
A wise judge knows how to think.				0.505
A wise judge has superb intelligence.				0.598
A wise judge is intuitive.				0.697

Note: The table summarizes the characteristics of a wise judge in terms of how similar they are to each other within the groups. Each group is called a factor. In this data, we found that there were four broad categories of judicial wisdom: judicial skill (Factor 1), people skill (Factor 2), open-mindedness to change (Factor 3), and intelligence (Factor 4). The factor loading is a correlation between the item and the factor, with a conventional cutoff of .40. Any item that has a factor loading of .40 or higher is retained.

58. Poor loading refers to items that fail to reach the conventional .40 cutoff. This is an indication that the item does not fit with the rest

of the items within the factor. Some items may not fit on any factors and are removed permanently from analyses.

DISCUSSION

This paper summarizes some of the first empirical work to address judicial wisdom, beginning with two studies trying to identify lay conceptions of what makes a wise judge. Consistent with past research, respondents seem to conceive of judicial wisdom as similar to the wisdom construct more generally but seem to include a quality particular to judges as well.

Our findings are useful in a number of contexts. First, they help lay groundwork for a sustained program of research into judicial wisdom. Second, they help us move toward developing an explicit theory of judicial wisdom, one that is better, and empirically, informed. The pattern of results obtained for characteristics of a wise judge replicate the theoretical approaches to studying wisdom. The studies presented here apply wisdom theories, both psychological and philosophical, to the specific context of judicial wisdom. The four factors identified through the data—judicial skill (Factor 1), people skill (Factor 2), open-mindedness to change (Factor 3), and intelligence (Factor 4)—not only reflect how others perceive what a wise judge is but also provide support for previously established theoretical models of wisdom. What is more, the characteristics of wise judges were generated by judges themselves, providing greater applicability and generalizability of the data.

Synthesizing both implicit and explicit theories helps us derive an idea of the ideal wise person.⁵⁹ Once there is some broad consensus about this, we might be able to assess how close to such an ideal particular people come. If so, then perhaps it is not unreasonable to use such constructs as evaluation tools for prospective judges. Third, relatedly, developing robust implicit theories of judicial wisdom helps researchers understand what lay participants in the legal process expect of judges. Do they have a sense of judges as reflecting an archetypal wisdom, insightful and equitable and perhaps willing to bend the rules and administer the spirit of the law rather than the letter, or do they see the wise judge as bound by strictures of the rule of law, or perhaps something in between? Combining such findings with existing research into public perceptions of the judiciary may be of use. For instance, Bybee and others have documented that the public views the U.S. Supreme Court justices as political actors and believe that political factors influence court decisions more than they ought.⁶⁰ One of several questions to connect these lines of findings is whether such perceptions correlate with a view of judges as “wise” or with a particular view of what judicial wisdom is. Connecting with the point above, another question might be to examine whether judges are seen as particularly

EXCELLENT JUDGE, EXPLORATORY FACTOR ANALYSIS

Items	FACTOR LOADINGS				
	1	2	3	4	5
An excellent judge is articulate.	0.620				
An excellent judge is knowledgeable.	0.550				
An excellent judge is experienced.	0.437				
An excellent judge has excellent writing skills.	0.574				
An excellent judge is highly intelligent.	0.472				
An excellent judge is fair to all parties.		0.404			
An excellent judge is neutral and unbiased.		0.667			
An excellent judge listens to all sides.		0.668			
An excellent judge is humble.			0.445		
An excellent judge is kind and caring.			0.869		
An excellent judge is sympathetic and compassionate.			0.801		
An excellent judge has a sense of humor.			0.476		
An excellent judge is ethical.				0.704	
An excellent judge has integrity.				0.766	
An excellent judge is honest.				0.414	
An excellent judge is just.				0.507	
An excellent judge treats all parties with respect.					0.500
An excellent judge has an ability to understand biases and prejudices.					0.435
An excellent judge exercises courtesy in judicial matters.					0.648
An excellent judge has the ability to make decisions.					0.436
An excellent judge is willing to learn and grow.					0.553
Note: This table summarizes the findings regarding characteristics of an excellent judge. Each characteristic is grouped with other similar characteristics forming five distinct factors: intelligence (Factor 1), fairness (Factor 2), compassion (Factor 3), ethics (Factor 4), and respect (Factor 5). Items assessing qualities of an excellent judge were analyzed separately from the wise-judge characteristics. The factor loading is a correlation between the item and the factor, with a conventional cutoff of .40. Any item that has a factor loading of .40 or higher is retained.					

59. Ardel, *supra* note 2, at xiv.

60. Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 306, 307 (Charles Gardner Geyh ed.,

2011); John M. Scheb & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 *POL. BEHAV.* 181, 188-89 (2001).

wise when they act politically, or, perhaps, when they do not follow the law strictly, or when they do uphold precedent despite what might be seen as an “unjust” outcome.

Judicial excellence was a secondary focus of this paper, in which we establish an initial model of how people think about characteristics of excellent judges. Through examining judicial wisdom and judicial excellence separately, we find that there are different characteristics highlighted in each, with some overlapping attributes. For example, interpersonal skill seems to be important for both excellence and wisdom. However, according to this data, to be considered an excellent judge, it is expected that one is additionally ethical and respectful, even more so than a wise judge.

CONCLUSION AND FUTURE DIRECTIONS

As noted above, our work begins a research program with the ultimate, broader goal of pulling together threads of psychological research and philosophical and legal discussions of judicial wisdom. With the empirical groundwork laid for assessing both judicial wisdom and judicial excellence, future research should refine the connection between these two important qualities of judges. We have raised a number of questions to be developed as the research progresses, some to be addressed empirically, and others that will integrate those empirical findings with our own (and previous) theoretical work.

*Jeremy Blumenthal, J.D., Ph.D., was a professor of law at Syracuse University. Professor Blumenthal passed away on December 19, 2014, before the completion of the current article that he planned to submit to Court Review. His co-author continued their work after Professor Blumenthal's untimely death to provide this article to the Court Review audience. From the Syracuse Law website: “Professor Blumenthal taught and wrote in the areas of property law and law and the social sciences, incorporating empirical research and data into legal issues. His work explored decision-making by judges and juries, paternalism, the reasonable woman standard, victim impact statements, behavioral law and economics, emotions in the legal system, and lay perceptions of crime. Recent publications focused on integrating empirical psychological research into property law; reviewing the field of law and emotions; and speculating about the implications of treating lawsuits as private property. He was also a co-editor of the treatise *Modern Scientific Evidence*.”*



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So You're Going to Be a Judge:

Ethical Issues for New Judges

Cynthia Gray

After being elected or appointed to the bench, a budding judge should immediately sit down and read the code of judicial conduct for her jurisdiction.¹ That review will alert the future judge to the ethical principles that will govern her time on the bench and begin a smooth, conflict-free transition from advocate to impartial arbiter.

Outlining the advice judicial-ethics committees have given about making that transition, this article highlights the provisions in the code of judicial conduct that will have the most immediate implications for a nascent judge even before taking the bench.² It begins by listing the inquiries a soon-to-be judge should make about charitable, business, and political activities to evaluate what changes are necessary to conform to the judicial-ethics rules. It also considers whether a new judge may accept gifts, including receptions, that are offered to mark the new position. Finally, the article discusses winding up a law practice, including duties to clients and payments for prior legal work.³

OFF THE BENCH

Rule 1.2 provides: "A judge shall act *at all times* in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety" (emphasis added). Thus, the code of judicial conduct applies to all of a judge's activities, both judicial and personal and both on and off the bench. In general, as described by Rule 3.1, a judge must not participate in extrajudicial activities that will interfere with the proper performance of judicial duties, lead to frequent disqualification, or appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

COMMUNITY ACTIVITIES

After election or appointment, a nascent judge may be surprised to learn that some civic and charitable activities that were an asset while a candidate may be prohibited after taking judicial office. Even laudable community activities may bias a

judge in favor of particular parties, causes, or issues, encourage individuals to curry the judge's favor, pressure others to comply with the judge's requests, or exploit the judicial office for the benefit of private organizations—or at least create the appearance of doing so. There is no exception in the model code that allows a new judge to continue prohibited involvement in civic and charitable activities after taking the bench. See *Arkansas Advisory Opinion 1996-10* (a new judge may not serve the rest of her term on the parks and tourism commission); *Florida Advisory Opinion 2006-28* (a newly elected judge should resign before taking office from any organizations in which his participation is inappropriate); *Texas Advisory Opinion 188* (1996) (a new judge may not attend the two meetings remaining in her term as a state representative on a national governmental association). But see *Canon 7C, Michigan Code of Judicial Conduct* (giving a newly elected judge until June 30th and a newly appointed judge six months to resign from organizations and activities).

Therefore, in the interim between being chosen and taking the bench, a new judge should ask the following questions and take any steps necessary to be in compliance with the new standards when she takes office:

- Am I a member of a governmental commission that does not concern the law, the legal system, or the administration of justice (Rule 3.4)?
- Am I a member of an organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation (Rule 3.6A)?
- Am I an officer of an organization or entity that is engaged in proceedings that would ordinarily come before me (Rule 3.7A(6)(a))?
- Am I an officer of an organization or entity that will frequently be engaged in adversary proceedings in the court on which I serve or in any court subject to the appellate jurisdiction of my court (Rule 3.7A(6)(b))?

Footnotes

1. The ethical standards for judges are established by the code of judicial conduct adopted in each jurisdiction. The basis for the state and federal codes is the *Model Code of Judicial Conduct*—adopted by the American Bar Association in 1972 and revised in 1990 and 2007—although jurisdictions modify the model before adopting it. Unless otherwise indicated, references to rules in this article are to the 2007 model code.
2. Over 40 states and the United States Judicial Conference have judicial-ethics advisory committees to which judges can submit inquiries regarding the propriety of contemplated future action. There are links to the websites of the committees at <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx?cat=Ethics%20Advisory%20Committees>.

3. The application of the code of judicial conduct requires a determination of the exact point at which a person becomes a judge, which varies from state to state and may vary even within a state depending on the selection process. In some states, a judge becomes a judge on taking the oath of office. See, e.g., *New York Advisory Opinion 1998-92*; *Oklahoma Advisory Opinion 1999-2*; *South Carolina Advisory Opinion 5-2006*; *Texas Advisory Opinion 293* (2007). Other states, however, have created different starting points. See, e.g., *Arizona Advisory Opinion 2000-7* (pursuant to constitutional provision, an elected judge becomes a judge on "the first Monday in January next succeeding their election," and, by statute, an appointed judge becomes a judge on the effective date of the appointment," that is, when the commission of office is signed).

If a future judge has in the past participated in fundraising for charitable organizations, she should review the code to see if she can continue those activities and inform the organizations about any new restrictions to prevent inadvertent violations of the code. Under Rule 3.7A, a judge cannot:

- solicit charitable contributions except from members of the judge's family or judges over whom she does not exercise supervisory or appellate authority;
- solicit memberships except in an organization that is concerned with the law, the legal system, or the administration of justice; or
- be honored at, be featured on the program of, or permit her title to be used in connection with a fundraising event unless the event concerns the law, the legal system, or the administration of justice.

BUSINESS AND FINANCIAL ACTIVITIES

"Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families," but participation "is subject to the requirements of this Code." Comment 3, Rule 3.11. Rule 3.11B, for example, will require a judge-select "to resign as an officer, director, manager, general partner, advisor, or employee of any business entity" unless the business is "closely held by the judge or members of the judge's family" or "primarily engaged in investment of the financial resources of the judge or members of the judge's family."

Further, a judge-select must examine her financial, business, or remunerative activities and withdraw from any that will (Rule 3.11C):

- interfere with the proper performance of judicial duties;
- lead to frequent disqualification;
- involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
- violate other provisions of the code.

A judge must divest financial interests that violate the code "as soon as practicable without serious financial detriment" (Comment 2, rule 3.11) but "in no event longer than one year" (Application § VI).

Finally, to ensure compliance with the disqualification provisions in the code, a new judge must begin:

- to keep informed about her personal and fiduciary economic interests (Rule 2.11B);
- to make a reasonable effort to keep informed about the personal economic interests of her spouse or domestic partner and minor children residing in her household (Rule 2.11B); and
- to conduct her business or financial affairs in a way that avoids frequent disqualification (Rule 3.1B).

FIDUCIARY POSITIONS

To comply with Rule 3.8A, a new judge has to withdraw from any "fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family . . ." ("Member of the judge's family" is defined as "a spouse, domestic partner, child, grandchild, parent, grand-

parent, or other relative or person with whom the judge maintains a close familial relationship.") Even if the fiduciary position is for a member of the judge's family, a judge must withdraw:

- if serving as a fiduciary will interfere with the proper performance of judicial duties (Rule 3.8A);
- if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before her (Rule 3.8B);
- if the estate, trust, or ward is or becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction (Rule 3.8B); or
- if serving as a fiduciary might require frequent disqualification (Comment 1, Rule 3.8).

A new judge must resign from an inappropriate fiduciary position "as soon as reasonably practicable, but in no event later than [one year] after becoming a judge."

A new judge must resign from an inappropriate fiduciary position "as soon as reasonably practicable, but in no event later than [one year] after becoming a judge." Rule 3.8D. The South Carolina committee advised that the rule does not authorize a new judge to remain a fiduciary for a year but only for the time necessary to avoid serious adverse consequences to the beneficiary, which can, in no event, be longer than one year. *South Carolina Advisory Opinion 21-2000*. See *Connecticut Emergency Staff Advisory Opinion 2014-21* (a nominee for judicial office may be sworn into office while he is still serving as the conservator of a person or estate in pending probate matters); *Massachusetts Advisory Opinion 2008-3* (a new judge should promptly take steps to remove herself as a trustee of a trust that is involved in litigation); *New York Advisory Opinion 2010-169* (a new judge may complete the tasks necessary to terminate conservatorships he held before taking the bench but should do so expeditiously and, in any event, within a year); *New York Advisory Opinion 2010-47* (a newly appointed judge may submit an application to be discharged from her duties as guardian for an incapacitated person and prepare a final accounting in a court proceeding); *New York Advisory Opinion 2009-103* (a new judge may complete fiduciary appointments made before the effective date of his appointment and receive compensation but should complete the work within one year, if possible); *New York Advisory Opinion 2002-37* (a new judge may not accept an appointment to serve as a fiduciary for compensation but may continue to serve in such capacity pursuant to an appointment made before assuming the bench); *New York Advisory Opinion 1995-39* (a recently elected judge who had been the conservator for an incompetent may, as a matter of necessity, continue to perform essential services but must move promptly for the appointment of a substitute); *Pennsylvania Informal Advisory Opinion 5/29/2012* (a new judge may not serve as executor of wills that he prepared while practicing law and should instruct his former law firm to inform the clients to replace him as fiduciary); *West Virginia Advisory Opinion* (March 21, 2011) (a new judge may continue to serve as executor of an estate that will be wrapped up in a couple of months).

The restrictions on political activity . . . apply immediately to new judges.

POLITICAL ACTIVITIES

The restrictions on political activity by judges vary considerably from state to state, may vary within a state depending on whether the judicial position is an appointed one or an elected one, and may even vary

from time to time depending on whether a judge is currently a candidate for re-election. A new judge should carefully examine the specific provisions of her state's code to see what rules to follow.

Under Rule 4 of the model code, a judge shall not:

- act as a leader in, or hold an office in, a political organization (Rule 4.1A(1));
- make speeches on behalf of a political organization (Rule 4.1A(2));
- publicly endorse or oppose a candidate for any public office (Rule 4.1A(3));
- solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate (Rule 4.1A(4));
- attend or purchase tickets for events sponsored by a political organization or a candidate (Rule 4.1A(5)); or
- become a candidate for a non-judicial elective office (Rule 4.5A).

The restrictions apply immediately to new judges. See *Arizona Advisory Opinion 1993-4* (an elected tribal official may not serve the balance of her term after appointment as a justice of the peace); *Illinois Advisory Opinion 1999-2* (a newly appointed judge may not continue to serve as an elected member of a public school board). Furthermore, some advisory opinions suggest that an individual who has been elected or appointed to a judgeship but not yet sworn into office is immediately bound by the same restrictions on political activity that will govern her conduct after taking office. *South Carolina Advisory Opinion 23-1994*. See also *Florida Advisory Opinion 2000-16* (a judge-elect may not actively participate in a non-judicial campaign before being sworn into office); *New York Advisory Opinion 1998-142* (a judge-elect who is vacating a seat in the local legislature should not engage in political activities in support of a candidate in the special election for the seat).

GIFTS AND RECEPTIONS FOR NEW JUDGES

A new judge will frequently be offered and can generally accept gifts from former law partners, close friends, colleagues, or bar associations to mark her investiture. A gift may necessitate the judge's recusal from matters involving the donor, but, in many instances, the donor is likely to be someone whose appearance in a case would necessitate the judge's recusal even without the gift, at least for some period, or a group where recusal may not be required for individual donors if each individual contribution is relatively small. *U.S. Advisory Opinion 98 (2009)*.

Advisory committees have allowed a new judge to accept:

- a gavel or judicial robe from members of her family (*New York Advisory Opinion 2012-177*);

- a robe from a bar association to which the judge belongs (*Arkansas Advisory Opinion 2000-10*);
- a clock from a bar association (*U.S. Advisory Opinion 98 (2009)*);
- a gavel from the state's attorney, who is a former employer (*Florida Advisory Opinion 1976-22*);
- gift certificates from her former law firm (*Pennsylvania Informal Advisory Opinion 2/28/2012*);
- a judicial robe from former law partners (*U.S. Advisory Opinion 98 (2009)*);
- a chair from former state judicial colleagues (*U.S. Advisory Opinion 98 (2009)*); and
- a gavel and \$500 from a former client (*U.S. Advisory Opinion 98 (2009)*).

The Connecticut advisory committee stated that a judge may accept a gift from her former state government office at a dinner celebrating her appointment, gifts given at a gathering of family and church members in honor of her appointment, or a gift from an attorney who had been opposing counsel in cases before her appointment and who is likely to appear before her if the nature or value of the gift is not so great that a reasonable person would believe that the gift would undermine the judge's independence, integrity, or impartiality. *Connecticut Informal Advisory Opinion 2013-10*; *Connecticut Informal Advisory Opinion 2013-9*; *Connecticut Advisory Opinion 2013-22*. But see *Maryland Advisory Opinion 2003-1* (a master should not accept a \$50 gift certificate from an attorney to whom the master referred numerous cases when closing his practice if the attorney might appear before the master); *New Jersey Advisory Opinion 4-2002* (a newly confirmed judge may not accept from his former law firm a trip worth approximately \$5,000).

Further, a new judge may allow her former law firm to sponsor and pay the expenses for a reception following her investiture. *Florida Advisory Opinion 1999-3*; *Illinois Advisory Opinion 2001-11*; *Minnesota Summary of Advisory Opinions*, at 20 (1995); *U.S. Advisory Opinion 98 (2009)*. See also *Washington Advisory Opinion 1995-5* (a new judge should report the expense of a reception hosted by her former firm if the value exceeds the limit for disclosure). The Illinois committee cautioned that a judge may be feted at a post-investiture party sponsored by her former law firm only if the party is not intended to advance the interests or status of the firm. *Illinois Advisory Opinion 2001-11*. The committee also warned the judge to exercise "selected control" over the magnitude or extravagance of the celebration and the number and nature of those invited.

Other groups may also sponsor a reception for a new judge. *Florida Advisory Opinion 1999-3* (attorneys in a new judge's community); *South Carolina Advisory Opinion 2003-16* (the chamber of commerce, local businesses, and area attorneys); *U.S. Advisory Opinion 98 (2009)* (a former corporate employer, a business client, a colleague, or a bar association). However, the advisory committee for federal judges warned that a new judge may not accept either a gift or a reception from a political organization; a for-profit company that has no pre-existing or long-standing relationship with the judge; or an organization that is publicly identified with controversial legal, social, or political positions or that regularly engages in adversary

proceedings in the federal courts. *U.S. Advisory Opinion 98* (2009). See *New Jersey Advisory Opinion 3-2001* (a new judge may not accept a check from the county bar association toward the cost of a swearing-in reception).

PRACTICE IN THE INTERIM

A lawyer may continue to actively practice law during any period after she is elected or appointed but before she takes judicial office. As the Georgia committee explained, “it would be unfair and unrealistic to require an active trial lawyer to immediately withdraw as counsel in pending cases simply because he or she has been elected to serve as a judge for a term to begin some several months after the election.” *Georgia Advisory Opinion 217* (1996). Similarly, the Florida advisory committee concluded that the risk of a judge-elect misusing judicial prestige while practicing law was outweighed by “the important consideration of allowing a lawyer to effectively and expeditiously conclude those legal matters that have been entrusted to the lawyer who has recently been elected to the bench.” *Florida Advisory Opinion 2000-39*.

In the interim, a newly chosen judge may appear as trial counsel (*Georgia Advisory Opinion 217* (1996); *Pennsylvania Informal Advisory Opinion 7/2/04*); practice before all courts, including the court to which he has been chosen (*Florida Advisory Opinion 1988-29*); handle both criminal and civil cases (*Florida Advisory Opinion 1988-29*); appear in jury and non-jury trials (*Florida Advisory Opinion 1988-29*); and be compensated according to a partnership or employment agreement (*Arkansas Advisory Opinion 1996-9*).

Several committees have suggested that, to avoid future disqualification issues, prosecutors should consider changing their duties when practicing after being chosen as a judge but before taking office. For example, the Florida committee approved a proposal by a circuit-judge-elect who was a chief assistant state attorney to appear only in misdemeanor cases or in felony cases in another geographic area of the circuit and to immediately relinquish administrative or supervisory control over felony attorneys who appear in the court in which she will sit as a judge, although the committee stated those measures were not required. *Florida Advisory Opinion 1984-21*. See also *Arkansas Advisory Opinion 1996-5* (a deputy prosecuting attorney who is running unopposed for a judicial seat may continue to prosecute cases in the same district until she takes office but should keep in mind future disqualification issues). The Kentucky committee even suggested that a judge-elect should resign as an assistant county attorney to minimize the problems of disqualification. *Kentucky Advisory Opinion JE-32* (1981).

WINDING UP A LAW PRACTICE

Rule 3.10 prohibits a full-time judge from practicing law. Therefore, attorneys must immediately begin to wind up their legal practices after learning they will become judges. For those in private practice, the winding up has two facets: terminating the representation of clients and terminating the relationships and financial arrangements that constitute the business of a legal practice.

Representation of Clients

After a judge takes office, there is no exception to the prohibition on practicing law that allows the new judge to complete pending matters for clients.⁴ *Arizona Advisory Opinion 2000-7*; *Oklahoma Advisory Opinion 1999-2*. The New York committee stated that, although a confirmed appointee may continue to practice law until taking the oath of office, he should keep in mind “the risk attendant upon the failure to do so within the prescribed period.” *New York Advisory Opinion 1998-92*. When the oath has been taken and filed, the committee emphasized, “the appointee has become a judge and may no longer practice law. At that point there can be no further ‘closing out’ to be done that requires the practice of law.” See also *South Carolina Code of Judicial Conduct, Canon 4G* (the prohibition on practicing law “becomes effective immediately upon taking the oath of office and applies to any case in the judge’s former practice that was not completed when judicial duties were assumed”).

Thus, judicial-ethics committees have advised:

- A new judge may not appear in a federal district court in another state to represent a defendant in a sentencing hearing shortly after he takes office. *Texas Advisory Opinion 293* (2007).
- A new judge may not represent a client in a mediation even if liability is not contested and the only remaining issue is the amount necessary to settle the case. *Texas Advisory Opinion 293* (2007).
- A new judge may not present the oral argument before an appellate court in a case he tried even if his client wants him to and opposing counsel does not object. *Florida Advisory Opinion 1977-2*.
- A new judge who briefed points raised in an appeal while an attorney may not be listed as an author on the brief. *New York Advisory Opinion 2013-8*.

After a judge takes office, there is no exception to the prohibition on practicing law that allows the new judge to complete pending matters for clients.

4. A few states have provisions that create a limited exception to the rule. See *Mississippi Code, § 9-1-25* (allowing a chancellor or circuit judge or a judge of the court of appeals to practice in any court for six months “so far as to enable them to bring to a conclusion cases actually pending when they were appointed or elected in which such chancellor or judge was then employed” and allowing a supreme court justice to appear “in the courts of the United States in any case in which he was engaged when he was appointed or elected judge”); *Compliance section, North Car-*

olina Code of Judicial Conduct (“[I]t shall be permissible for a newly installed judge to facilitate or assist in the transfer of his prior duties as legal counsel but he may not be compensated therefore”); *Rule 3.10 and comment 2, Tennessee Code of Judicial Conduct* (“A newly elected or appointed judge can practice law only in an effort to wind up his or her practice, ceasing to practice as soon as reasonably possible and in no event longer than 180 days after assuming office”; “no new matters may be accepted”).

Given the strictness of the rule against judges practicing law, “a newly elected judge should devote substantial attention to winding up the law practice”

- A new judge may not assist a former client seeking satisfaction of a judgment entered before he took the bench. *Florida Advisory Opinion 2009-9*.⁵

Of course, the practice of law “is not limited to appearing in court, or advising and assisting in the conduct of litigation, but embraces all advice to clients and all actions taken for them in matters connected with the law,” including “the preparation of pleadings, and

other papers incident to actions and special proceedings, conveyancing, the preparation of legal instruments of all kinds, and the giving of legal advice to clients.” *Florida Advisory Opinion 2005-19*. Thus, those types of acts are also prohibited for a new judge. See *Florida Advisory Opinion 2006-1* (a recently appointed judge may not sign a title-insurance policy after taking the bench even if the documents were recorded and the policy took effect before the judge took office); *Florida Advisory Opinion 1983-3* (a new judge may not complete a real-estate transaction by attending the closing or complete the probating of two estates); *New York Advisory Opinion 1989-38* (a new judge may not complete unfinished legal services for an estate even if no court appearances are necessary); *West Virginia Advisory Opinion* (December 19, 2012) (a new judge may not prepare a legal document related to his prior employment).

There is no exception that would allow a new judge to perform “ministerial” acts for clients. The New York Court of Appeals removed a judge for continuing to perform legal or business services for clients, continuing to act as a fiduciary in several estates, and maintaining a business and financial relationship with his former law firm, which had an active practice before his court. *In the Matter of Moynihan*, 604 N.E.2d 136 (N.Y. 1992). The judge had contended that the tasks he performed—for example, filling out tax returns, banking activities,

expediting stock transfers, and administering an estate—were purely “ministerial” acts that did not conflict with his judicial responsibilities. The Court held that, to the extent the acts were ministerial, there was no justification for his failure to turn them over to another attorney. The judge had also claimed that his actions were necessary to wind up a busy practice with long-standing responsibilities to clients. However, the Court found that the two years the judge had continued to provide services after assuming the bench was “an inexcusably long period,” noting that the work involved matters that came before the judge’s own court, albeit before different judges.

Rejecting a judge’s argument that he had interpreted the code in good faith to allow him to finish his law practice by performing clerical activities after he took office, the Arkansas Supreme Court concluded that the work the judge had performed was more than ministerial or clerical and constituted the active practice of law. *Judicial Discipline and Disability Commission v. Thompson*, 16 S.W.3d 212 (Ark. 2000). In one case, the judge had met with clients in his chambers to discuss a settlement, accompanied the clients when they negotiated the settlement check, faxed a letter to co-counsel confirming their fee arrangement, and sent co-counsel a cashier’s check with a letter, written on his judicial stationery, directing her to approve the order of dismissal and giving her directions on closing the case. In a second case, the judge had participated in several depositions and exchanged legal correspondence and documents with opposing counsel and the court clerk regarding settlement.⁶

Duties to Clients

Given the strictness of the rule against judges practicing law, “a newly elected judge should devote substantial attention to winding up the law practice, with due regard for the rights and expectations of existing clients.” *Florida Advisory Opinion 2000-39*. For example, before assuming judicial office, an attorney must withdraw from client representation and cease accepting new clients (*New York Advisory Opinion 2005-130(A)*) and arrange for new counsel to handle any outstanding motions scheduled to be heard after she assumes judicial office (*New York Advisory Opinion 2004-137*).

5. See also *In re Ramich*, Determination (New York State Commission on Judicial Conduct, December 27, 2002) (<http://www.cjc.ny.gov/Determinations/R/Ramich.Thomas.E.2002.12.27.DET.pdf>) (censure for, in addition to other misconduct, corresponding with attorneys in connection with the pay-off of a debt owed to the successor in interest to a client for whom the judge, as an attorney, had obtained a judgment, and signing a satisfaction of judgment as an attorney for the judgment creditor); *In re Slusher*, Stipulation and Agreement (Washington State Commission on Judicial Conduct, April 3, 1992) (<http://www.cjc.state.wa.us/Case%20Material/1992/1205%20Stipulation.pdf>) (public admonishment for attempting to secure funds for a former client by communicating with the attorney for the other party).

6. See also *In re Jefferson*, 753 So. 2d 181 (La. 2000) (removal of judge who, in addition to other misconduct, participated in a case as counsel for four years after becoming a judge, including writing a letter to opposing counsel seeking to close the file and signing a motion to dismiss that was filed during his second term of

office); *In re Ryman*, 232 N.W.2d 178 (Mich. 1975) (removal for, in addition to other misconduct, maintaining an office and furnishing legal services to former clients after assuming office); *Commission on Judicial Performance v. Osborne*, 876 So. 2d 324 (Miss. 2004) (public reprimand for filing six complaints and two bankruptcy petitions in the six months after he became a judge); *In re Intemann*, Determination (New York State Commission on Judicial Conduct, October 25, 1988) (<http://www.cjc.ny.gov/Determinations/I/Intemann.William.H.Jr.1988.10.25.DET.pdf>) (removal for, in addition to other misconduct, continuing to provide legal services for three estates); *Disciplinary Counsel v. Bender*, 11 N.E.3d 1168 (Ohio 2014) (two-year stayed suspension for (1) during his transition from private practice to the bench, neglecting a client’s personal-injury case and continuing to practice law after becoming a judge and (2) failing to timely withdraw his earned fees from his client trust account, commingling personal and client funds).

Except for the addition of the deadline imposed by taking office, the ethical responsibilities owed to clients when an attorney leaves the practice of law to become a judge are no different than those owed when an attorney ends representation for any other reason, and an attorney should consult state resources on that issue immediately after appointment or election. Rule 1.16(d) of the *ABA Model Rules of Professional Conduct* provides that “[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests” The rule specifically requires:

- giving reasonable notice to the client;
- allowing time for employment of other counsel;
- surrendering papers and property to which the client is entitled; and
- refunding any advance payment of fees or expenses that has not been earned or incurred.

Judicial-ethics committees have applied those rules to attorneys newly chosen to become judges. See *Arizona Advisory Opinion* 2000-7; *Illinois Advisory Opinion* 1994-12; *Michigan Advisory Opinion* J-2 (1989).

Thus, a budding judge should discuss with her clients the options for obtaining counsel for pending matters, assist the client in locating counsel with the required expertise, and discuss pending cases with the client or the client’s new attorney. *Alabama Advisory Opinion* 13-920; *Arizona Advisory Opinion* 2000-7. See *Kansas Advisory Opinion* JE-11 (1984) (an attorney who is becoming a judge may not suggest or recommend the services of any particular lawyer). A file can be transferred to another attorney only after full disclosure to the client and the client’s consent, not only to the transfer but to any fee arrangement between the transferor and transferee attorneys. *Michigan Advisory Opinion* JI-89 (1994); *New Mexico Advisory Opinion* 2012-14; *South Carolina Advisory Opinion* 21-1998; *Texas Advisory Opinion* 293 (2007).

Before taking the bench, a judge-elect should make clear to her clients that she can no longer represent them in any way after being sworn in, including providing advice or consulting about continuing cases and prior work. *South Carolina Advisory Opinion* 21-1998. Further, any necessary “discussion of pending cases with new counsel that would constitute the practice of law should take place during the process of closing the law practice, not after the judge takes office.” *Florida Advisory Opinion* 2005-19. The New York committee suggested that “the safe and ethical practice would be for the judge-elect to concentrate, during the closing of the law practice, on providing subsequent counsel with everything necessary to avoid the need for later discussions.” *New York Advisory Opinion* 2000-77.

However, advisory opinions do distinguish between giving legal advice, which is prohibited after taking the bench, and providing factual information, which may be permitted. For example, the Connecticut committee advised that a new judge may answer a successor attorney’s questions about “factual matters not readily apparent from the file” or “the nature and location of documents and other historical information” as long as she does not “answer questions involving legal advice or litigation strategy.” *Connecticut Informal Advisory Opinion* 2013-12. See also *Alabama Advisory Opinion* 13-920.1; *Nevada Advisory Opinion* JE13-001.

The exception has been applied to allow judges to file affidavits or unsworn statements or even testify about former representation. For example, the Massachusetts committee advised that a judge may testify pursuant to a subpoena in a civil suit about estate-planning documents he prepared for clients after obtaining the former client’s waiver of the attorney-client privilege (or obtaining legal advice from his own counsel about whether the privilege should be asserted) and after ascertaining whether the information may be obtained from another source. *Massachusetts Advisory Opinion* 2009-5. However, the committee reminded the judge not to give an opinion, strategize with her former client’s current counsel, or take steps to advance the client’s cause. See also *Connecticut Informal Opinion* 2013-34; *New York Advisory Opinion* 1996-128; *New York Advisory Opinion* 2007-32; *New York Advisory Opinion* 2004-67; *New York Advisory Opinion* 1991-137. But see *Florida Advisory Opinion* 1979-12 (a judge may not, absent a subpoena, testify before a state administrative agency regarding the history and purpose of a statute she drafted while general counsel for a state administrative agency); *Kansas Advisory Opinion* 161 (2008) (a judge should not provide an affidavit about his recollection of events related to a journal entry in a civil case in which he represented the plaintiff).

The issue of post-bench consultation arises frequently in criminal cases given the sometimes lengthy post-conviction relief proceedings. For example, the Nevada advisory committee stated that a judge could provide the current prosecutor a written verbatim transcription of her otherwise illegible notes about a case prepared when she was prosecutor as long as she did not discuss the notes, transcription, or any other matter or otherwise help the current prosecutor prepare for a new sentencing hearing. *Nevada Advisory Opinion* JE1998-3. See also *Florida Advisory Opinion* 2006-12; *Illinois Advisory Opinion* 1994-19; *New York Advisory Opinion* 2011-96; *New York Advisory Opinion* 1996-128; *New York Advisory Opinion* 1995-20; *Pennsylvania Informal Advisory Opinion* 4/20/2009.

Similar advice has been given to former defense counsel. For example, the Massachusetts committee gave a judge permission when subpoenaed to give factual testimony before the parole board about a former client’s decision to forgo a plea offer made by the prosecutor but advised the judge to ask counsel whether her testimony was truly necessary or whether information might be obtained from some other source. *Massachusetts Advisory Opinion* 2006-2. See also *Massachusetts Advisory Opinion* 2001-2; *New York Advisory Opinion* 2013-53; *New York Advisory Opinion* 2007-153; *New York Advisory Opinion* 1995-116. But see *Florida Advisory Opinion* 1999-4 (a judge may not execute an affidavit explaining why he took certain steps while representing a former client and commenting on the former client’s good character to be submitted to a prosecutor to resolve criminal charges of workers’-compensation fraud).

The issue of post-bench consultation arises frequently in criminal cases given the sometimes lengthy post-conviction relief proceedings.

[T]he amount to be paid to the judge cannot be based on work performed or profits earned after the judge's departure from the firm.

PAYMENTS AFTER TAKING THE BENCH

Judicial-ethics committees have advised that a judge may, after taking the bench, accept various types of payments related to her pre-bench legal practice. A revised code of judicial conduct adopted in 2015 in Maine expressly allows that practice:

A judge, after leaving practice and becoming a judge, may continue to receive fees and payments entirely earned

while engaged in the practice of law before becoming a judge, including fees for services rendered, payments from structured settlements and judgments to be paid over time, deferred compensation plans, retirement plans, payments to the judge for sale of his or her practice, payments to the judge for his or her equity upon leaving a firm, and any other fees or payments entirely earned while engaged in the practice of law before becoming a judge.

Rule 3.11E. The majority rule is that a judge is disqualified from any matters involving a firm or attorney while the judge is receiving payments from the firm or attorney. *See* Cynthia Gray, "Disqualification Issues Faced by New Judges," *Judicial Conduct Reporter* (Fall 2010).

Addressing a common situation, the advisory committee for federal judges stated that a new judge may receive payments from her former firm after taking judicial office pursuant to an agreement providing for payment of an agreed amount representing a departing partner's interest in the firm. *U.S. Advisory Opinion 24* (2009). Other committees have approved receipt of similar payments. *See Alabama Advisory Opinion 1986-248* (a judge may share law-partnership profits earned but not paid before his assuming the bench for the approximately one year it would take to complete all financial settlements); *Alabama Advisory Opinion 1989-351* (a judge's former partner may execute a promissory note evidencing deferred compensation to come due in almost two years); *Arkansas Advisory Opinion 1996-9* (a new judge may accept a lump sum or installment payments from the law firm he left); *Connecticut Informal Advisory Opinion 2008-19* (a new judicial officer may accept a single payment for work done on a contingency-fee lawsuit); *Connecticut Informal Advisory Opinion 2008-19A* (a judge may accept payment from a former law firm for a case initiated on behalf of a client that the judge had brought to the firm as a "rainmaker" in lieu of any payments for his interest in the practice when the sole remaining case is settled approximately four years later than the firm and judicial official had contemplated); *Delaware Advisory Opinion 2004-2* (a new judge may receive a percentage interest in receivables collected for services performed before his departure for a year, and, after a year, a lump sum representing the judge's interest in a present-value calculation of accounts receivable, anticipated proceeds from contingent-fees cases, and payments under the firm's retirement plan); *Florida Advisory Opinion 1976-1* (a new judge may accept a fixed amount for his interest in his former law

firm and the proportionate share of the fees earned before his elevation to the bench); *Florida Advisory Opinion 1974-4* (a new judge may receive annual installment payments for his interest in a firm computed on a predetermined formula pursuant to a standard contract for all shareholders); *Florida Advisory Opinion 2003-2* (a new judge may receive periodic payments for his interest in his former firm or a note executed for the balance); *Georgia Advisory Opinion 12* (1977) (a new judge may receive his pro rata share of fees earned but not collected as of the time of his retirement from a firm); *Louisiana Advisory Opinion* (July 8, 2010) (a new judge may receive installment payments over 18 months from his former law firm representing approximately 10% of the fees the firm received from his clients during his tenure with the firm); *Maine Advisory Opinion 2005-2* (a new judge may over time be paid the amount of money due from his former law partners); *Massachusetts Advisory Opinion 2000-1* (a new judge's former firm may pay him a fixed amount at a reasonable rate of interest in installments over 10 years); *Minnesota Advisory Opinion 2014-1* (a lump-sum payment for a judge's interest in his former law firm is preferable, but, if immediate liquidation would cause serious financial detriment, an installment sale is permissible); *Nebraska Advisory Opinion 2007-2* (the remaining shareholders in a new judge's former law firm may purchase his interest if he holds the funds in a blind trust until a note of which he is a co-maker is expected to be paid off); *New York Advisory Opinion 2011-21* (a judge may receive a discretionary year-end bonus as a former partner from his former firm based only on work he performed before assuming the bench); *Ohio Advisory Opinion 2007-2* (a new judge may receive retirement benefits from his former law firm pursuant to an agreement only for a reasonable period to minimize the number of cases in which he will be disqualified); *Pennsylvania Informal Advisory Opinion 10/29/2010* (a judge may receive installments for the agreed-upon value of his interest in the law practice, including fees earned before he took the oath of office; the firm may sign a promissory note for the deferred payments); *West Virginia Advisory Opinion* (January 16, 2001) (a new judge may receive intermittent payments from his former law firm for an extended period).

However, the amount to be paid to the judge cannot be based on work performed or profits earned after the judge's departure from the firm. *Arkansas Advisory Opinion 1996-9*; *Nebraska Advisory Opinion 1989-1*; *U.S. Advisory Opinion 24* (2009). Some committees require that the amount to be paid must be fixed before the judge takes office (*Florida Advisory Opinion 1974-4*; *Maine Advisory Opinion 2005-2*; *Minnesota Advisory Opinion 2014-1*), although others simply indicate the amount should be set "if possible" (*Nebraska Advisory Opinion 1989-1*; *U.S. Advisory Opinion 24* (2009)). The duration of the installments should be short (*Minnesota Advisory Opinion 2014-1*; *Pennsylvania Informal Advisory Opinion 10/29/2010*) and "end at the earliest practicable date, ideally within a few months" (*Arkansas Advisory Opinion 1996-9*), although some committees have approved periods of 18 months (*Louisiana Advisory Opinion* (July 8, 2010)), several years (*U.S. Advisory Opinion 24* (2009)), and as long as 5 years (*West Virginia Advisory Opinion* (March 21, 2011)) or even 10 years (*Massachusetts Advisory Opinion 2000-1*).

For lawyers who leave a solo practice or small firm, judicial-ethics committees have approved a variety of arrangements that include payments after the judge takes office. See *Florida Advisory Opinion 2013-1* (a lawyer who has been appointed as a judge may sell his interest in a law practice and collect payments over time while sitting as a judge, but payments for goodwill may not take into account fees earned in pending matters transferred to the acquiring firm); *Florida Advisory Opinion 1996-26* (a lawyer recently elected to the bench may transfer his practice to a purchasing attorney for a lump sum if the practice is valued before the judge assumes the bench in an arms-length transaction based on the best reasonable estimates and may take a promissory note for a portion of the lump sum as long as the future payments remain irrevocably tied to the value of the practice at the time of the transfer); *New York Advisory Opinion 2000-3* (a newly elected judge may receive compensation for the equity value of the judge's share in a law partnership that is dissolving as a result of his election as determined in accordance with generally accepted accounting principles); *Pennsylvania Informal Advisory Opinion 12/7/2009* (a judge-elect may sell his law practice in accordance with the rules of professional conduct and receive payment after being sworn in).

Fees

With certain conditions, after taking office, a judge may receive payment of legal fees for prior work done as an attorney, including hourly fees, flat fees, and contingency fees, from former clients, former partners, former firms, successor lawyers, or successor firms. The Ohio committee explained:

Newly elected or appointed judges are not expected or required to forego compensation for legal services they provided before assuming judicial office. No rule in either the Code of Judicial Conduct or the Rules of Professional Conduct can be construed to require such forfeiture of legal fees earned prior to taking the bench.

Ohio Advisory Opinion 2007-2. The rule applies to a former solo practitioner, salaried associate of a firm, or a partner or shareholder who receives a percentage of the firm's fees. *Kentucky Advisory Opinion JE-41* (1982). See also *Alabama Advisory Opinion 2013-921*; *Alabama Advisory Opinion 1997-659*; *Alabama Advisory Opinion 1981-114*; *Arkansas Advisory Opinion 1996-9*; *Connecticut Informal Advisory Opinion 2008-19*; *Florida Advisory Opinion 2009-9*; *Florida Advisory Opinion 1993-38*; *Florida Advisory Opinion 1986-7*; *Florida Advisory Opinion 1981-11*; *Georgia Advisory Opinion 12* (1977); *Illinois Advisory Opinion 1994-12*; *Kansas Advisory Opinion JE-68* (1996); *Kentucky Advisory Opinion JE-41* (1982); *Maryland Advisory Opinion 2003-1*; *Maryland Advisory Opinion Request 1974-6*; *Massachusetts Advisory Opinion 2008-2*; *Minnesota Advisory Opinion 2014-1*; *Missouri Advisory Opinion 62* (1981); *New Mexico Advisory Opinion 2012-14*; *New York Advisory Opinion 1996-91*; *Oklahoma Advisory Opinion 2005-2*; *Pennsylvania Informal Advisory Opinion 2/11a/10*; *South Carolina Advisory Opinion 21-1998*; *West Virginia Advisory Opinion* (December 18, 2000); *West Virginia Advisory Opinion* (September 28, 1998).

The Ohio advisory committee noted:

Often the compensation due to the judge will be

straightforward, such as when the legal services were provided pursuant to an hourly fee or flat fee agreement. In hourly rate matters, the judge would be entitled to receive the accounts receivable reflecting the number of hours billed by the judge times the agreed upon hourly rate. In flat fee matters, the judge would be entitled to receive the accounts receivable for the agreed upon flat fee.

The [Ohio] committee advised: "The most prudent approach in a contingent fee matter . . . is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit"

Ohio Advisory Opinion 2007-2. However, it continued, "sometimes, the compensation due to the judge is less clear, such as in contingent fee matters that are not completed before the judge assumes judicial office."

If the contingent fee matter is completed before the judge is sworn into office, the judge would be entitled to receive the accounts receivable for the agreed upon contingent fee rate in the fee agreement. But if the contingent fee matter is not completed before the judge is sworn into office, there is no clarity as to how the judge is to be compensated. Is the judge entitled to compensation based upon the agreed upon contingent fee rate or is the judge entitled to compensation based on quantum meruit? Is the judge entitled to compensation before the contingency occurs or must the contingency occur?

The committee advised:

The most prudent approach in a contingent fee matter that is not completed before the judge takes the bench is for the judge to accept compensation, once the contingency occurs, based upon quantum meruit for services performed prior to assuming judicial office. In some circumstances, such as when the contingency fee matter was nearly completed before taking judicial office, the quantum meruit compensation might equal the agreed upon percentage rate in the contingency fee contract. In other circumstances, such as when the contingency fee matter was undertaken shortly prior to taking the bench and little work was performed by the judge on the matter, the quantum meruit would most certainly not approach the agreed upon contingent fee. [Citation omitted.]

There is no time limit on a judge's ability to accept fees. See *Alabama Advisory Opinion 2013-921* (a judge may accept his share of legal fees for work he performed before taking office even nine years after becoming a judge); *Florida Advisory Opinion 1997-9* (a judge may accept fees based upon work performed from 1988 until she became a judge in 1990 in a personal-injury case that did not settle until 1997); *New York Advisory Opinion 1995-12* (a judge may accept fees previously earned that were not payable for one year or longer); *Oklahoma Advisory Opinion 2005-2* (a judge may accept payment of a fee

[A] new judge may take steps to collect fees if she avoids abusing the prestige of office to do so.

owed by a former client four years after going on the bench and after he had formally forgiven all accounts receivable).

There are several conditions imposed on a new judge's acceptance of fees:

- The amount, the percentage, or the method for calculating her share must be established before the judge takes office.
- The amount the judge receives must reasonably reflect only the amount of work she did on the case before assuming the bench.
- The judge must not receive any part of a fee that was collected in matters that were not pending with the firm at the time she left or that was generated by clients on matters that arose afterwards.
- The division of fees between the judge and the lawyer or firm who completes the work should be reasonable and in proportion.
- The fee must not be clearly excessive.
- The fees must be proper under the rules of professional conduct.
- The computation must be based on traditional standards.
- The judge should consider whether the decision to accept payment affects her disqualification from matters involving the client, opposing parties, and the law firm or lawyer.
- The fee arrangement must have been fully disclosed to the client.

Compare *West Virginia Advisory Opinion* (December 18, 2000) (a fee arrangement must be in writing), with *Alabama Advisory Opinion 13-921* (if the arrangement is traditional or standard in the legal profession and the judge's former law firm, the lack of a written agreement does not necessarily prevent the judge from receiving the compensation due for work performed), and *Connecticut Information Advisory Opinion 2008-19A* (although a pre-existing verbal separation agreement is acceptable, written agreements are preferable).

Further, a new judge may take steps to collect fees if she avoids abusing the prestige of office to do so. See *Maryland Advisory Opinion 2003-1* (if a newly appointed master was a sole practitioner, the master may collect previously earned fees from former clients); *Minnesota Advisory Opinion 2014-1* (a former solo practitioner may continue to collect accounts receivable for a reasonable period following his appointment as a judge); *New York Advisory Opinion 1995-12* (to collect fees, a new judge may forward bills to former clients for outstanding balances due for services rendered before becoming a judge); *West Virginia Advisory Opinion* (November 25, 2009) (a judge may prepare fee petitions for legal work he performed before taking office in a number of cases). *Contra Kentucky Advisory Opinion JE-32* (1981) (a judge must turn his accounts over to another lawyer for collection).

Relationship to Firm

"Upon assuming judicial office, a judge is required to sever all ties with the judge's former firm." *Michigan Advisory Opinion*

Jl-89 (1994). As an essential step in that process, a new judge must ensure that her name is deleted from a former firm's name. The name change is required by both the code of judicial conduct and the rules of professional responsibility. Rule 1.3 of the code prohibits a judge from abusing the prestige of office to advance private interests. Rule 7.5(C) of the *Model Rules of Professional Responsibility* states that the "name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." See *Kentucky Advisory Opinion JE-41* (1982) (a new judge has a duty to see that his name is removed from a firm name, and the firm has a "like duty"); *Louisiana Advisory Opinion 155* (1999) (a judge may not permit his former law firm to use his name in the firm name); *Michigan Advisory Opinion Jl-89* (1994) (a judge may not allow his name to remain in the name of his former law firm); *New York Advisory Opinion 1989-136* (before assuming judicial office, a judge must remove his name from a firm's masthead). See also *Annual Report for Calendar Year 2015, Arizona Commission on Judicial Conduct*, at 9 (<http://www.azcourts.gov/Portals/137/2015%20CJC%20Annual%20Report.pdf>) (describing a private warning to a justice of the peace to ensure that his former law firm's website did not give the appearance or leave the impression that he still practiced law with the firm, including, but not limited to, removing his name from the firm name). Cf. *Massachusetts Advisory Opinion 2003-9* (a judge whose former firm has refused his requests to remove his surname from the firm name may file a complaint with the board of bar overseers but is not required to do so); *New York Advisory Opinion 2015-19* (a judge who asked his former law firm in writing to remove his name from the firm's signage, letterhead, and other materials need not take further action).

Further, a new judge must ensure that her name is not used in professional notices sent out by her former firm. *Michigan Advisory Opinion Jl-89* (1994). See also *Florida Advisory Opinion 2006-10* (a new judge may not allow his former firm to make a congratulatory announcement about his recent appointment in the *Florida Bar News* or a letter to the firm's clients); *Florida Advisory Opinion 1994-45* (a new judge may not assent to the publication of a congratulatory announcement by the judge's former law firm or the firm's mailing of a congratulatory announcement to its clients); *Massachusetts Advisory Opinion 1990-1* (a judge must notify members of his former law firm that he objects to the use of his name and title in a brochure the firm is preparing for distribution to clients and prospective clients).

Whether a judge may maintain retirement funds in a former firm's plan at least for a short period depends on whether that arrangement would require frequent disqualification and whether there is an alternative that will not result in a substantial loss to the new judge. For example, the Connecticut committee advised that a judge may leave accumulated funds in a retirement plan set up by her former law firm for a reasonable time but in no event longer than one year after taking the oath of office and should not hear any cases in which her former firm is involved. *Connecticut Informal Advisory 2015-13*. If she creates a self-directed sub-account for which she directs all investments and pays all fees and into which the

firm makes no further contributions, the committee advised, the judge may maintain the account for longer than a year but must disclose to counsel and to parties her participation in the firm's plan when members of the former law firm appear. See also *Alabama Advisory Opinion 91-417* (a judge may leave accumulated funds in the retirement plan set up by his old law firm if he sets up a sub-account for which he pays the management fee and into which the firm makes no further contributions on his behalf); *Delaware Advisory Opinion 2004-2* (if the terms of a former firm's retirement plan permit a new judge to withdraw assets, he should do so; if the terms do not permit withdrawal, the issues that could arise out of a judge's continued participation in a former firm's retirement plan will depend on the nature and terms of the plan); *Minnesota Summary of Advisory Opinions*, at 20 (2001) (unless the account can be transferred to another plan without substantial loss, a recently appointed judge may maintain a pension and profit-sharing account with his former law firm for a reasonable period not to exceed three years); *Pennsylvania Informal Advisory Opinion 10/29/2010* (a new judge may not keep his retirement account at his former law firm if lawyers from the former firm will regularly appear before him, if investment decisions are no longer made by the trustee, but by members of the former law firm, or if it is not possible for the judge to create a sub-account for which he pays the management fees and into which the firm makes no further contributions; the judge may maintain the account for a reasonable time to avoid serious financial detriment).

Several committees have advised that a new judge who was a solo practitioner or part of a small firm that is breaking up when she leaves may maintain the existence of the firm after taking the bench solely to wind up its financial affairs. For example, the Connecticut committee received an inquiry from a judicial nominee who was the sole shareholder in a small firm that would cease to practice law after the nominee was confirmed because the other attorneys were joining other firms. *Connecticut Informal Advisory Opinion 2014-4*. The committee advised that the former firm could remain in existence and retain its name (that of the new judicial officer) on a bank account solely for receiving payments of fees as long as the firm was not held out to the public as being in existence, there was a written agreement as to how the funds were to be distributed, clients were notified that the firm was dissolved but that payments should continue, and payments were received only for work done before the judge's confirmation. See also *Massachusetts Advisory Opinion 2008-2*; *Minnesota Advisory Opinion 2014-1*; *New York Advisory Opinion 2007-5*; *New York Advisory Opinion 2005-130(A)*; *South Carolina Advisory Opinion*

13-1996; *South Carolina Advisory Opinion 8-2003*; *West Virginia Advisory Opinion* (November 10, 2011).

While winding down, the firm can collect accounts receivable, send periodic bills to former clients, maintain an escrow account, pay debts, submit corporate-income-tax returns, file unemployment forms for employees, organize and store financial records, and retain client records. However, the firm should be dissolved as soon as practicable (*New York Advisory Opinion 2007-5*; *New York Advisory Opinion 2005-130(A)*) and remain in existence only until all accounts receivable are collected or until the end of the year, whichever is earlier (*South Carolina Advisory Opinion 13-1996*), or within a year after the judge assumes office, even if some receivables are still outstanding (*Minnesota Advisory Opinion 2014-1*). But see *Ohio Advisory Opinion 1995-3* (law-firm partners and a newly elected judge should not continue their law partnership even for the sole purpose of collecting accounts receivable).⁷

CONCLUSION

Attorneys are accustomed to being governed by a code of ethics, of course, but the rules in the code of judicial conduct will be new, touch on every part of a new judge's life, and, in some respects, require a reversal of practices the attorney has followed for years. Thus, an immediate, thorough review of the code may prevent a very public stumble by a new judge and begin the commitment to judicial independence, integrity, and impartiality the judge will be eager to maintain throughout a long career on the bench.

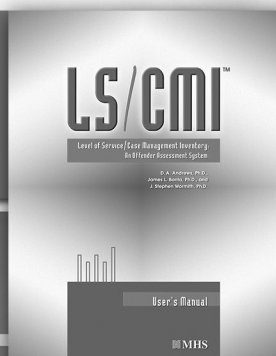


Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.)

She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncscjudicialethicsblog.org), writes and edits the *Judicial Conduct Reporter*, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

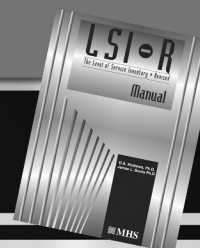
7. Cf. *Florida Advisory Opinion 2005-8* (after assuming the bench, a new judge should close a trust account from his practice even though it is only being used for the distribution of funds when received, and future disbursements should be made through the trust account of a third party); *Florida Advisory Opinion 2006-1* (a recently appointed judge is required to change the status of his professional corporation or dissolve it before taking the bench even though it will be required to file an income-tax return, issue W-2 forms, and prepare other documents well after the date he

takes the bench; his former professional association's operating account may remain open but should reflect the status of the new legal entity established before the judge takes the bench); *Florida Advisory Opinion 2006-31* (a new judge and his former law partner may continue to maintain a partnership account solely to receive fees due the partnership for work done before his election as long as the partnership has been formally dissolved, the account is closed within a reasonable time, and the two former partners perform no professional services).



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ANNEXATION by Victor Fleming

Across

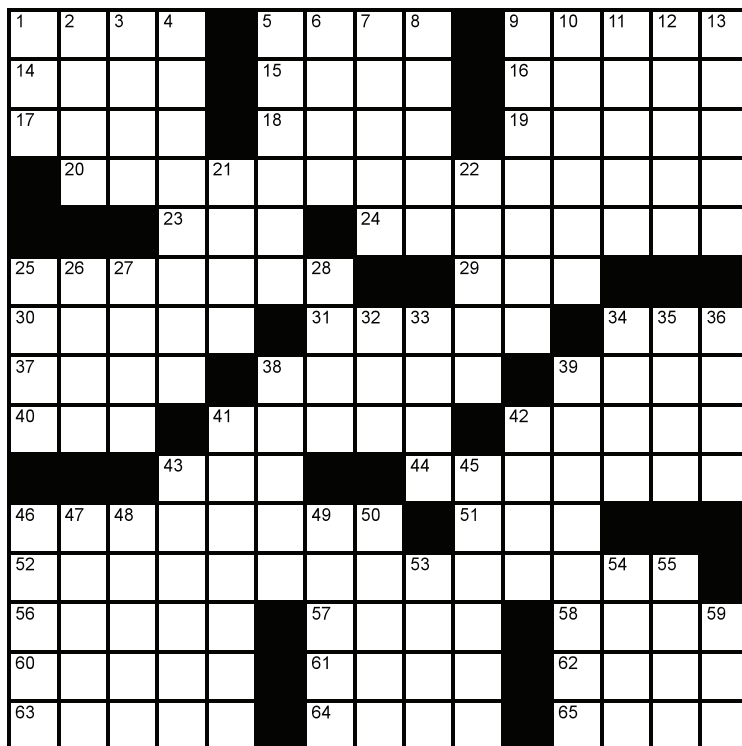
- 1 Bunny's leader?
- 5 Act the jackass
- 9 Egypt's Mubarak
- 14 Folklore fiend
- 15 Do darn near nothing
- 16 Marine menace of WWII
- 17 Inter ____
- 18 Borne burden
- 19 Word after print or broadcast
- 20 Start of a quotation by Laurence J. Peter
- 23 Call's counterpart
- 24 Latte ingredient
- 25 Accepts, as responsibility
- 29 South of Spain?
- 30 Part 2 of the quotation
- 31 Mitch who wrote "Tuesdays with Morrie"
- 34 Rap sheet abbr.
- 37 Mountain pool
- 38 Brings home the ____
- 39 Felipe of baseball
- 40 Popeye's Olive
- 41 Proceeds circuitously
- 42 Part 3 of the quotation
- 43 Not feel so good
- 44 Contemptuous cry
- 46 ____ Best (Starbucks subsidiary)
- 51 "La ____" (Debussy work)
- 52 End of the quotation
- 56 Present one side of, as a case to an appeals court
- 57 South American country
- 58 Go full ____ (proceed at maximum speed)

- 60 Ignorance, in an adage

- 61 Before too long
- 62 Writer Bagnold
- 63 Tries to reach
- 64 Track tipper
- 65 Quitclaim trailer?

Down

- 1 Long fluffy scarf
- 2 Wrinkled citrus
- 3 Filled with gloom
- 4 Brad Pitt's costar in "The Tree of Life"
- 5 Inebriated
- 6 Telephoned
- 7 Clear sky hue
- 8 What nods may translate to
- 9 Dull as dishwater
- 10 ____ the law (did one's civic duty)
- 11 Some Dairy Queen orders
- 12 Items to be filed
- 13 Writer Calvino
- 21 Expel, as a leader
- 22 Printer maker
- 25 Former Yugoslav president
- 26 On vacation, perhaps
- 27 Actor Malden
- 28 Round bread of India
- 32 Calculator feature, initially
- 33 Juicy pear
- 34 Ski resort near Snowbird and Park City
- 35 German statesman Helmut
- 36 "The Clan of the Cave Bear" novelist Jean



- 38 Female of the ball
- 39 Imputed
- 41 "... counsel is leading the ____"
- 42 Article
- 43 When stars start to show in the sky
- 45 ____ to something (succeed)
- 46 Some hunks of meat
- 47 "Copperhead Road" singer Steve
- 48 Dickinson of "Police Woman"
- 49 Certain exile, for short
- 50 Courtroom employee

- 53 Short pants?
- 54 "And Then There Were ____"
- 55 Buffalo's canal
- 59 Byrnes of "77 Sunset Strip"

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 59.

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The Resource Page



JUDICIAL ETHICS BLOGS

Judicial Ethics and Discipline Blog
<http://ncscjudicialethicsblog.org>

Legal Profession Blog: Judicial Ethics and the Courts
<http://goo.gl/EHuaId>

Two blogs that are regularly updated can be a good resource that keeps judges thinking about the ethics rules we must abide by. Since reasonable people sometimes differ in their conclusions about the boundaries of ethics rules, it's good to follow more than one blog in this area, and both of these are good ones.

One of them—the Judicial Ethics and Discipline Blog—is maintained by Cynthia Gray, director of the Center for Judicial Ethics now housed at the National Center for State Courts. Gray has been tracking judicial-ethics issues since 1990, and she keeps track of pretty much everything that happens—advisory opinions, disciplinary cases, and rule amendments. A recent posting covered the issues that arise when a judge's spouse or relative supports a political candidate. You can sign up at this blog to receive each update by email.

The second blog—Judicial Ethics and the Courts (really the judicial-ethics entries from the larger Legal Profession blog, found in full at goo.gl/9yUJMB)—is regularly updated by Michael S. Frisch, the ethics counsel at Georgetown University and an adjunct law professor at Georgetown Law. He also covers recent cases and advisory opinions. For example, a recent posting talked about a North Dakota advisory opinion regarding the use of social media in an election campaign as well as whether a sitting judge may wear a judicial robe in campaign materials. Frisch not only summarized the recent advisory opinion (with a link) but also provided an excerpt from a 1979 North Dakota Supreme Court case that found no problem with a judge's campaign use of a video taken in judicial robes in a courtroom.



MORE ON JUDICIAL WISDOM

Heidi M. Levitt & Bridget R. Dunnivant, *Judicial Wisdom: The Process of Constructing Wise Decisions*, 28 J. CONSTRUCTIVIST PSYCHOL. 243 (2015).

Bridget R. Dunnivant & Heidi M. Levitt, *The Development of Wisdom in Judicial Decision-Making*, 43 HUMANISTIC PSYCHOLOGIST 1 (2015).

Psychology professors Heidi Levitt and Bridget Dunnivant set up a study to shed some light on the concept of judicial wisdom. They published two articles with their results—one getting at the definition of judicial wisdom and the other looking at how it can be developed.

The researchers interviewed 11 judges nominated more than once by others as wise judges. These 11 judges were asked about the behaviors and attitudes they associated with wise legal decision making. They talked about what they believed fostered wisdom, such as curiosity and seeing situations as nuanced rather than black and white.

These judges typically valued styles of courtroom management that emphasized listening, giving respect to litigants, explaining court procedures, and expressing compassion for parties while still upholding the law. They felt that it was important to be engaged in each case—not only giving their full attention to the parties and the law but also recognizing and dealing with the emotions that inevitably arise on the bench. Wise judges developed strategies for dealing with situations where their own values conflicted with the law or where they felt that the correct legal outcome was not necessarily the fair one.

To better promote wisdom, these judges suggested that law schools put more emphasis on pretrial problem solving, interpersonal skills, emotional intelligence, and social justice. They also felt that increasing the diversity of the judicial profession would be helpful.

Only abstracts of the articles are available on the web (go to goo.gl/NJpsif and goo.gl/FnnlEr); the full articles are available for purchase. But you can get more information from an audio interview with Professor Levitt. It's available at proceduralfairnessblog.org.



ARTICLES OF INTEREST

Fred L. Cheesman II, Scott E. Graves, Kathryn Holt, Tara L. Kunkel, Cynthia G. Lee & Michelle T. White, *Drug Court Effectiveness and Efficiency: Findings for Virginia*, 34 ALCOHOLISM TREATMENT Q. 143 (2016), available at <http://goo.gl/NrGgwu>.

The Virginia state courts contracted with the National Center for State Courts to conduct a statewide outcome and cost-benefit evaluation of Virginia's adult drug courts. The findings will be of interest to many, including those in jurisdictions that have—or might want to have—a drug court.

The program's overall finding was that drug courts saved taxpayers about \$20,000 per participant when compared with a business-as-usual alternative path through the judicial system. The study compared participants in Virginia drug courts with similar Virginia defendants who did not go through a drug-court program. The researchers concluded that successful graduation from a drug court led to a statistically significant reduction in the expected number of offenses committed thereafter.

One notable contribution of this evaluation was a finding that taxpayer dollars are saved on drug-court participants even before they are admitted to the drug court. At least in Virginia, these offenders spend less time in pretrial confinement (and supervision) than they would in the business-as-usual alternative (usually probation). In addition, the researchers found support for the use of cognitive-behavioral treatment in drug courts.